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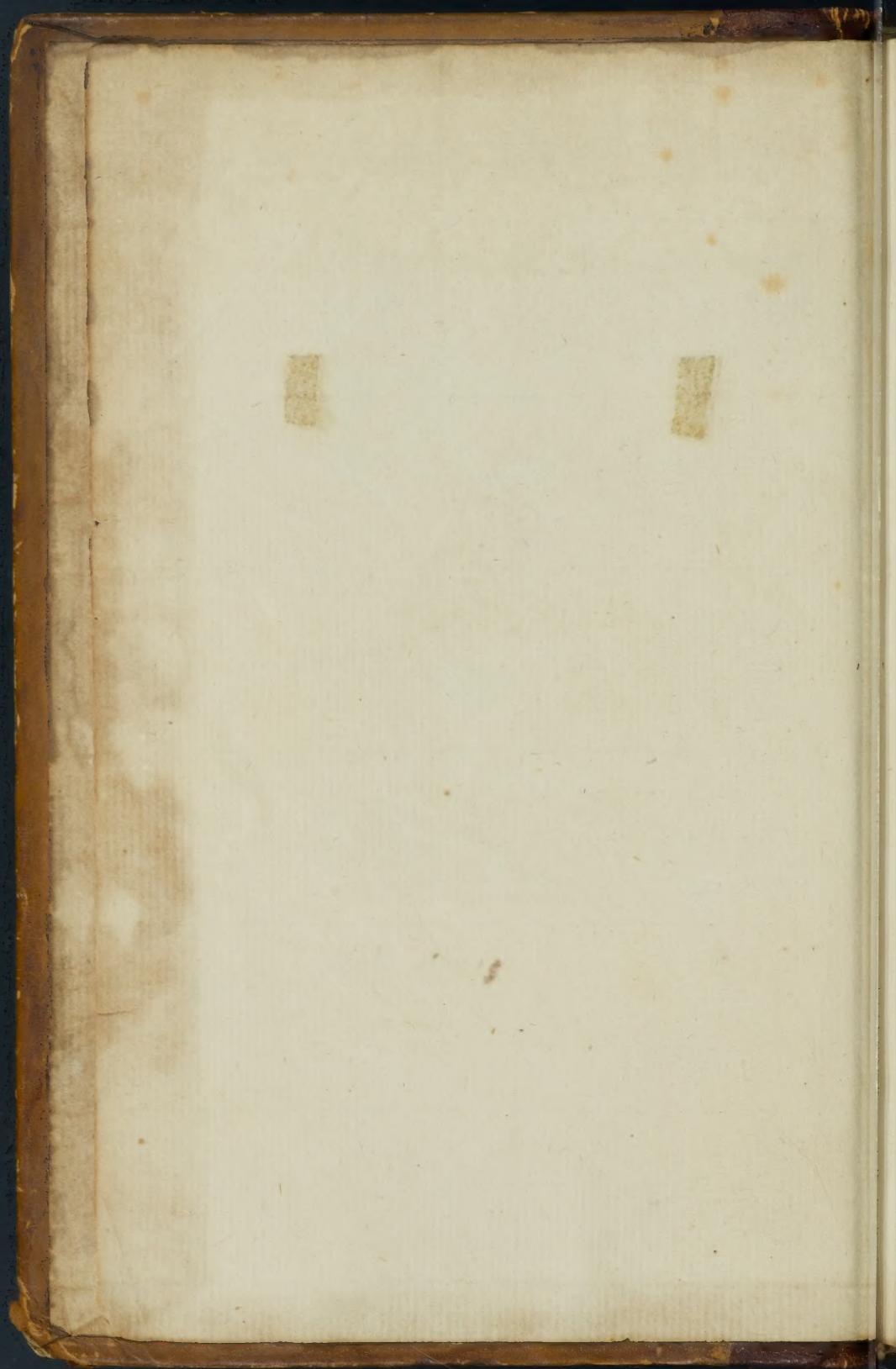
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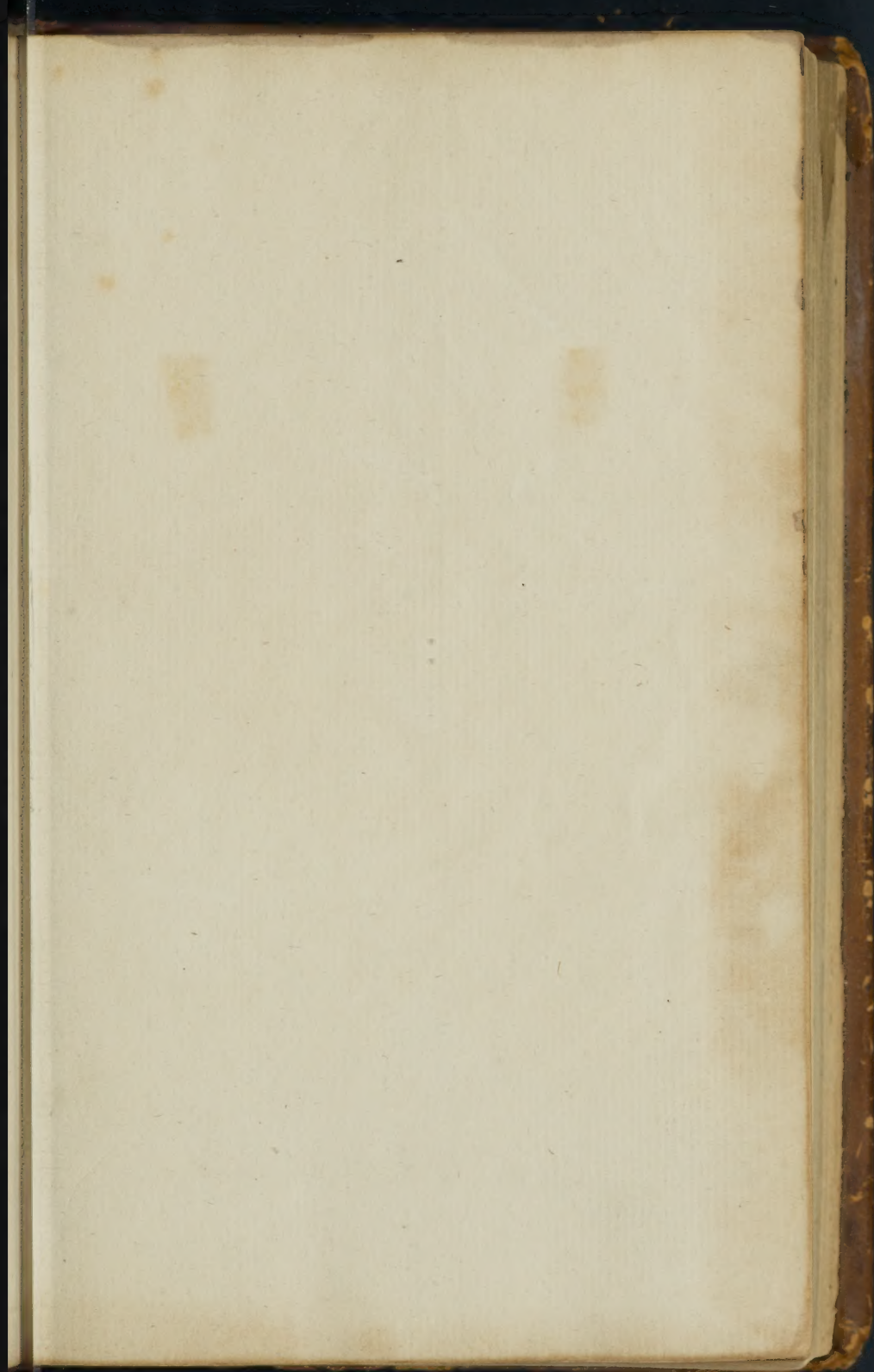
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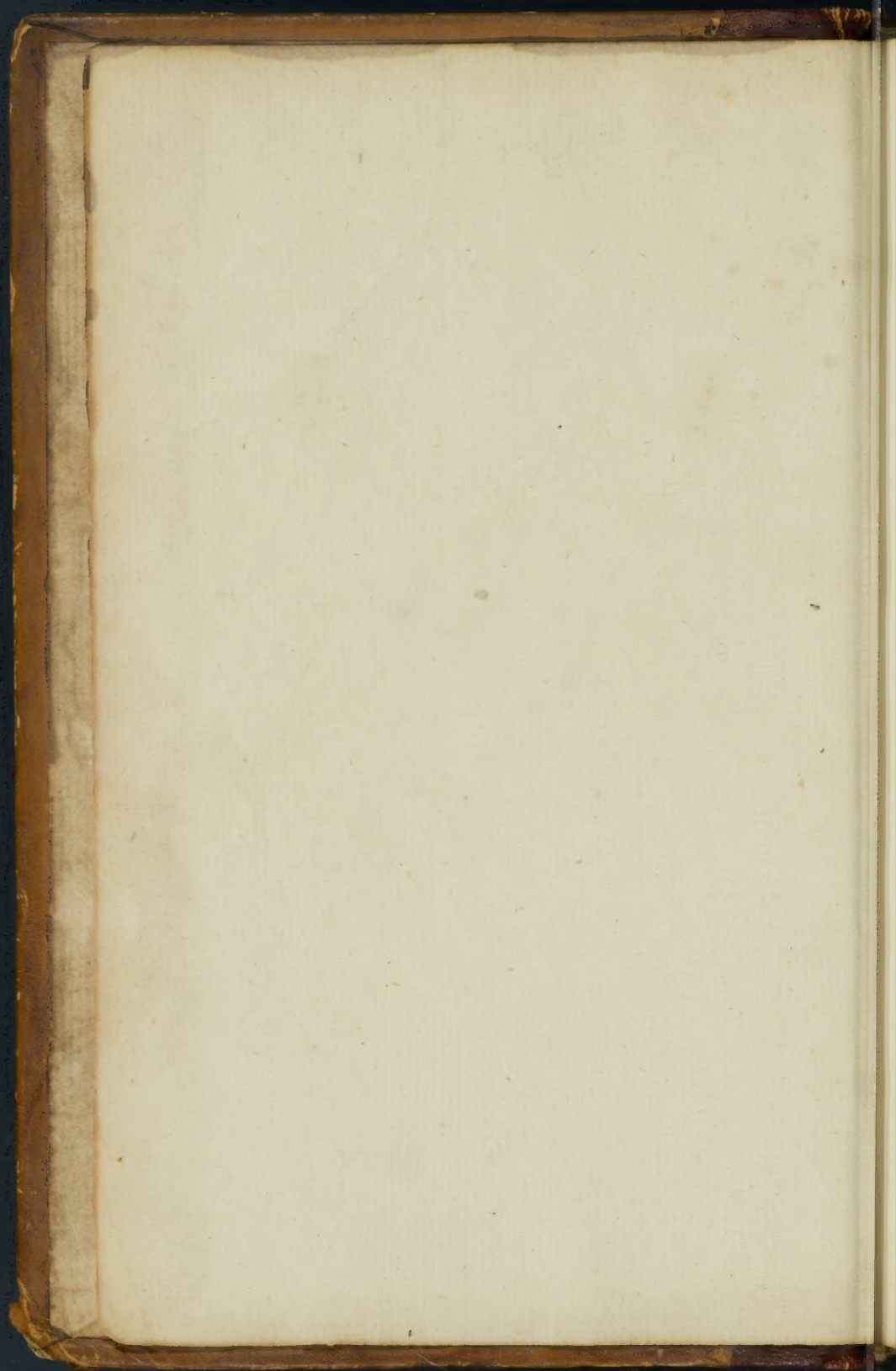
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Lectures
on
Municipal Law
by
Tapping Reeve L. L. D.

viginti annorum lucubrationes.

Taken by C. Baldwin 1810 & 1811.

Volume 3rd.

London

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Executors and Administrators

Wills & acts are representations of deceased persons for certain purposes - i.e. as to their real estate, & the debts which affect such real estate 1. How. 199, 2. Co. 299.

An exr is a representation ut supra appointed by the last will of the deceased, & his debts as exr is to execute the will 2. Co. 309.

To make an exr tit unnecessary that the word exr should be used - tit enough if the deceased's intention can be clearly learnt. 2. Co. 309. "I commit all my goods to the discharge of exr" How. 177, 2. Co. 309, How. 39.

The appointment of an exr is essential to the existence of a will. 2. Co. 309, Co. Litt. III. 26, How. 231, 2. Co. 309, How. 82.

A disposition of real property in contemplation of death not containing an appointment of an exr is called a testament. 2. How. 2.

It has been called a codicil in the civil l. - & tit to govern in the disposition of the property of the deceased. 2. Co. 466, How. 231, How. 245, 2. How. 2, 2. Co. 309.

There may be a will without a testament & vice versa, How. 2.

Naming an exr is by implication a gift to him of the goods of the deceased - exrs being bound to pay the debts - hence naming an exr makes a will. 2. Co. 312, How. 82.

At B. l. a testamentary disposition of lands without naming an exr was called a will - in case of chattels tit called a testament ut supra, 2. Co. 309, Co. Litt. III.
A testamentary disposition of lands is not now so called.

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Executors & Administrators

An actor is a representation of the deceased person, appointed by L. thus its proper organ or minister.
1. Com. 257. 2. Pl. 496.

They are appointed only in three cases - 1st when no actor is appointed - 2nd when he can't act as actor & 3rd when he will not act as such.

Executors & actors are considered in they as trustees to whom entitled to the real prop of the deceased. 1. P. H. 431. 2. Atk. 44. 6. 7.

Hence the jurisdiction of they is in cases of mere personality between executors & actors & most of them. 9. Pa. 25.

The heir is the person appointed by L. to succeed to the real estate on the death of his ancestors. 2. Atk. 201.

The devisee is the person entitled to the real prop by testamentary appointment. 1. 271. 9. Pa. 466. 2. Pl. 312.

The power of executors over real prop is usually that of trustees - ut supra - except so far as they themselves are entitled to it. Their real prop executors & actors have no power - real estates were not originally testamentary. 2. Pa. 492. of executors 904. Com. 21. 2.

Executors may have the disposition of real estate like other persons - i.e. by express appointment of the testator. So if the lands are devised to be sold for the pay of debts, the executors tho not expressly empowered to sell, is considered in they the proper person, no other being appointed. 1. Atk. 420.

But actors as such have in no such power - the heir is the proper person to manage the real estate. Parv. 8. 299. 1. Sec. 304.

Exors & Adms

It has been sd that in Bar the exors & adms as such³ represent the deceased, as to both real & personal prop. This is incorrect. The idea seems to have arisen from the heirs being liable as such to pay the ancestors' debts, & from the real prop being subjected to debts of all kinds. Exors & adms have neither jus ad rem nor jus in rem they are not even trustees of real estate - so in sum they may have a power granted by a judge of probate to sell - but so may strangers Root. 104.

Intermingling with real estate does not make an exor de son tort. In the ancestor's death, the title to lands not devised, vests immediately in the heirs - it must vest in the heir as in the admr - but an admr can't save it - he can't maintain ejectment - During the settlement of even an insolvent estate, an admr can't maintain trespass - the heir must do it - tho he must account with the admr in this case for damages. In Bar the heir may recover the land immediately & probate may order a sale afterwards.

A deed of land sold by an exor under a power from probate, signed by her not as exor, & in which she is not named as such, nor the power counted upon, don't pass the interest - Such a deed of good or evil would be rejected. Such an omission would be relieved as in Chry. 1. Root. 100.9.

The legatee receives the legacy thro the exor. (How 528.
Dyer. 254. 9. Bar. 48 or 487. Off. Ex. 27.29.

The devisee takes prop without the intervention of the exor - the same R applies in Bar - but why so if the exor has the same power over real as over personal prop? The personal prop is charged by L. with all the debts of the

Dates & Dates

deceased - but in ~~the~~ the real estate is liable for debts
by specialty, & debts of record only. Howe 99, 2 Bl. 430, 3 Do.
490, 2 Do. 478. 244. S.

At & L. or rather since the stat Westminster 2. debts
or judgt record, or judgt debts, bind real estate
from the first day of the term on which they
were recovered, & goods & chattels from the date of
the execution. Now by stat 29. Hen. 2. they bind the
lands as in bona fide purchasers, only from the day
on which judgt was signed - & the goods &c only
from the delivery of the execution to the officer.
3 Bl. 420.

According to the old L judgt bond bind in the
hands of the heir from the time of the original
suit. 3 Bl. 26.

Specialty ~~enter~~ may resort to either the real or personal
estate - & if they come upon the ~~real~~ & is insufficient
to discharge all the debts, the ~~enter~~ by simple contracts
are liable to lose all their demands, as they can may
be without any remedy at L. since they can't take
real estate & are postponed to specialty ~~enter~~. How 99, 2 Bl. 420.
2 Do. 477.

But here chry will relieve the simple contract ~~enter~~ by
setting them in upon the real estate, for as much as
the specialty ~~enter~~ have taken from the ~~real~~. Pow 497.
Salk 59, 4 Ch. Dec. 4. 2. 1 Eq. Ba. 46. 44.

The relief is afforded by chry, ordering a sale of the
real ~~property~~ in the hands of the heirs - some indulgence in
chry is shewn to g. legatees. Salk. 416.

If the avails of the sale are insufficient average is made

Extr & Adm

If extr in equal degree, he who first obtains judgment⁵ in the extr is entitled to the whole of his demand even to the exclusion of the adm. 9.P.W.40.

If after such suit is commenced, ^{in Eng} or a bill is brought in Chancery, the extr can defeat his claim by voluntarily paying the others. 9.P.W.401. Fallb.217. Br. Par. Ven.287.

In Eng- if lands are devised to the extr for the payment of debts, he cannot for that reason be sued at L. for extr as having any assets in his hands. 1.Bom.400. 2.P.W.416. 2.Her.106. 1.Roll.920.

He can be compelled at L. to sell the lands - land not being considered as assets in his hands so as to subject him at L. - but Chancery will compel him to sell i.e. the extr - & that even tho the D. is not to the extr, if it is not to any other purpose. 1.Atk.420.

There are several kinds of assets - 1st Real - i.e. as descend to the heir & make him liable for such debts of the ancestor, & claims upon him as bind his real estate. 1.Bom.498 9.Ba.32. 9.Lev.286. 9.MoD.224. 2.Bl.254, 902. 940. 6arth.127.

2nd Personal - or assets extra main - i.e. such part of the deceased as comes to the extr as such, & makes him liable to extr & legacies. 1.Bom.999. 2.Bl.110.

Again assets are legal or equitable - legal are such as go in a course of administration - i.e. according to the order or priority of debts - Equitable are such as are distributed among all extr equally pursuante. Pow.125. 129. 12W.430. 3.D.941.

An equity of redemption of a mortgage in fee is equitable assets - for at L. the whole estate is forfeited. Pow.44.124. 2.Her.61. 1.D.411. 2.Atk.293 9.P.W.331. 9.Ba.33.

So too it is in any mortgage whether in fee or not - But in case of a mortgage in fee the mortgagor has no other than an equitable interest, for there is no reversion - But if lands in fee be mortgaged per se, the reversion is legal afets - & the ~~extor~~ ^{extor} may have a judgment in the heir of the mortgagor per afets, quando acciderint - i. e. there is a stay of execution till the reversion happens. comes into hope. Bow. Ch. 128. 1 Mer. 410. Salt 954. 2 Mer. 194. 2 Atk 295.

In Bow. our eqly of redemption is legal afets - A reversion expectant on the determination of an estate tail is no afets. 3 P. W. 235. Bow. 111. 444.

There is a contrariety of opinion as to the quality of afets arising from the sale of land devised to be sold or devised to be sold, tho' not expressly devised for the payment of debts whether they are legal or equitable? According to most of the older ~~extors~~ ^{extors}, money arising from the sale of lands devised to the extor, or subject to his power to pay debts are legal afets, on the principle that whatever comes to the extor or such, is legal afets. 1 Lev. 224. Hardj. 409. 1 Mer. 69. 2 Dr. 106. 247. 408. Br. Ch. 127. 196. 1 Atk. 420. 2 P. W. 552. 416. note.

Yet the Latent language in this case & some of the oldest ones, considering the extor in the double character of extor & trustee, have availed themselves of the latter character, & considered the afets as equitable. Finch. 196. 1 Mer. 199. 4. 1 Atk. 484. 2 Dr. 50. 1 Ch. Ch. 150. note.

The 1st Br. Ch. 195. Lord Thurlow denies the case in 1 Atk. 420. Bow. Ch. 129. This case seems to have overruled the old ~~extors~~ ^{extors}.

For money raised at request by trustees is equitable afets no reason of Chancery exclusive jurisdiction over proper trusts. 2 P. W. 416. note. 1 Mer. 194. 2 Atk. 50.

But it has been sd that when lands are charged

with the payt of debts &c descend to the heir & are not devised, i.e. when the interest don't pass by the D. they are legal assets. 2 P. W. 416. note. Cow. M. 196. 2. Att. 299. 1. Q. W. 490.

The stat is fraudulent D. has given the specialty enter in such cases an action of debt at l. in the hands of the obligor. 9. Re. 27.

In conformity with the last R it has been holden that money arising from the sale of lands, under a power or to sell for the payt of debts &c. should be legal assets because the lands descend & the descent is not broken. 1. Att. 474. 9. Do. 360. 690.

This distinction is evaded by Lord Sumner, who held that the descent was broken by a power to sell, as much as by a D. to sell carrying the interest by express words. 1. Ch. 190. 7. 150. note. 6. Litt. 112. 9. 2. Ch. 236.

Lands descending to an heir are to be applied to the payt of bond debts, before lands specially devised can be taken. This R. is reversed when the lands are specially devised for the payt of debts. 9. Att. 156.

There is in our L. no priority founded in any difference between securities or sorts of debts - tho there is in certain cases a priority arising from the consideration out of which that debt grows, & from the prerogative & privilege of the crown. As in case of insolvent estates, funeral charges, last sickness debts, & dues to the state are first paid - the remainder is divided pro tanto. 11. of. Don. 170.

If the testator charges debts upon the heir, & the estate reverts to the real fund, the estate may come upon him for the amount - i.e. when the testator's intent is that the real fund shall not be diminished.

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Exors & Adms

In Eng. the heir is made ut ante for specially debts to the amount of his assets - tho still the obligee may sue the exor if he pleases. Est. 248. Ho. 605. 9. Ba. 25. Row. 441. 9. Co. 12. Eng. 9. 459.

So he may sue the heir for rent & the exor for rent. 9. Ba. 25. 9. 459.

But if he recovers judgment in both & receives a full satisfaction from one, the other may be released by an audita querela.

Exors & adms are bound by the costs of the deceased as far as they have assets tho not named. 2. Ba. 449. 4. Co. 117. bro. 8. 589. Eng. 14.

The heir is never bound by the special costs of the ancestor unless expressly named, because according to the old feudal & no other potus than goods (not the land itself) were liable to execution on the special costs of the ancestor - therefore not liable but by express words. 9. Ba. 25. 9. 1. Ho. 180. Row. 440. 6. Ho. 60. 9. Ba. 92. 8. 9. 2. Roll. 472.

The debtor's body cannot originally be liable to execution. 9. Ba. 92. 8. 9.

And even when the heir is bound, or rather when the obligation descends with the land, his body cannot be taken in execution - tis in the land only. 9. Ba. 25. Dyer 31. 6. Litt. 299. 290. Moore. 209. Row. 62. 209. 18. or 215.

The land is appointed to enter not in fee, but till the issue & profits shall discharge the debt (assigned at v. l. in the heir would be useless). 2. Ba. 92. 9. Co. 12. bro. 8. 459. Row. 441.

This is the only instance in which land could be taken in execution, founded on post actionem, at v. l. 2. Ba. 92. 8. 9. 9. Ba. 25. 9. Co. 12. 2. Bl. 160. 1. 9. Do. 418.

Extus & actus

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The preceding is meant when in behalf of subjects - the king might always take lands in execution in default of final assets. 3. 60 H. 2. Ca. 329. Row 441.

Land of the debtor first made liable while in his own hands, & half of them to execution for debt & by stat. 4. H. 13. Ed. 1 by elegit. The same year the stat. de meoatoribus, was passed enabling the debtor to pledge all his lands by a recognisance, in the nature of a vinculum venditionis. 2. H. 16. 3. Do. 41. 2. Ca. 329. 2. Roll. 497.

The person of the debtor was first subjected to execution for debt &c. by the stat. 25. Ed. III. This gave the capias ad satisfactionem. 3. Ca. 329.

Extus & actus are used on the counts of the deceased only in the detinet, not in the debit, because they are liable on by in respect of propter, which they hold for others not in their own right. 2. Ca. 449. 3. 60 H. 19. Sid. 379.

Charging in the debit & detinet is now caused by the verdict under the stat. 16. & 17. Geo. II. 2. Ca. 443.

There is an exception where the extus & actus are personally liable as they may be in some cases. E.g. for rent incurred on a lease for years after the testator's death - for here he is charged in his own person. 2. Ca. 449. Sid. 297. Row. 6. 1. Roll. 603. Bro. & 711. Mod. 966. 1. Bro. & 546. Bro. & 222. In this case the testator was most indicted.

He is chargeable in the debit in case of a devautant. 2. Ca. 44. 1. Sid. 498. 1. Roll. 603. i.e. after judgment is given as extus de bonis testatoris, for he shall not be charged with a devautant or more ruinous. 5. 60. 32. 1. Hist. 321.

He here must be sued in in the debit & detinet.

Estates & Actions

because he has a title in his own right, & the debt descends with the land. 9. Co. 22. 8. Co. 96^a (How. 440. 6. 1. Rev. 130.

Charging him by detinent only is added under the stat 16. & 17. Car. II, 3. Ba. 29

at B. L. the heir could defeat the specialty estate by recovering the land, before the action ^{was brought} 3. Ba. 26. 6. Bitt. 102.

But if he alienes it after the writ is purchased, or the bill is filed in banco regis, the land was then in the hands of the purchaser. 9. Co. 26. Banth. 255. 1. Mod. 259.

So that judgment in the heir binds the land by retrospect-
recurs in case of judgment in the ancestor - Now by stat 9 & 4. W. &
M., the heir in case of such an alienation before action
is liable to the value of the estate sold, but the land in
the hands of a bona fide purchaser is not liable.
9. Co. 26. 1. Bq. Ba. 119. 1. O. W. 177.

If the heir alienes after the action is brought the debt
it now is as at B. L. 9. Co. 26.

A testator can't bind his estate when he is not himself
bound. e.g. A covenants to take B an apprentice - or that
his estate shall pay 11^s. - No action lies in the estate for the
10. B. 2. Co. 449. Eves. 6. 92. 8. C. R. 483. 6. Eng. 109. Bur. 133.

Commonly land devised were not liable in the hands
of the devisee for the bond debt - the estate had no remedy
at L. or in equity. 9. Co. 27. 2. Bl. 278. 1. Bq. Ba. ab. 149. 3. Bl. 440.

By stat 9 & 4. W. & M. D., of bonds are void in land estates
- & the bond estate may have debt in the devise & the heir
jointly & severally. 9. Co. 27. 2. 9. 1. Bq. Ba. ab. 329.

Exors & Adtors

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Can the devise be sued unless the heir be joined Exp. 248.
Bro. Ch. 999. 2. Atk. 121. 9. 499. Bro. 7. 479. 1. P. M. 49.

But a D for the payt of debts, or raising portions for
younger children is not within the stat. Such D.s are good
& bond cetera can't defeat them - they are paid only like
other cetera permi paper 2. Ba. 27. 1. 9. Atk. 690. 1. P. M. 490. 776. note.

The heir of an heir is liable for the bond debts of the lat-
ter ancestor, but the second heir is liable in nocase.
I suppose no further than the first had assets, & not so
far, unless the second heir has assets of equal amount
from the first. 1. Ba. 28. 2. Bk. Ba. 179. 1. W. 400. Dyer. 344.

Exors or adtors ^{of the heir} are scarcely not liable as such, for the
debts of the heir or ancestor, for the heir himself is liable
only in respect of the land. 3. Ba. 28.

But tis sd if the heir alien the land to defeat the cetera
they will follow the money into the hands of the cetera
or heir. 1. Ba. 28. 2. Ba. 996. 2. W. 62. 75. Bk. Ba. 54.

The heir as such is not liable in law to pay his ancestor's
debts - but if no remedy can be had wth the cetera the heir
may be liable in equity, on the principle that they will
pursue the assets wherever they are. 2. Mod. 203. 2. W. 62.
1. Ba. 28. 2. Ba. 996. 2. W. 75. 1. Horn. 266.

Heirs as such are liable in law at l. on the ancestor's
covenant of warranty.

Who may be an Executor?

All persons who can make wills & many others may
be exors. 1. W. 180. 1. Horn. 920. Bk. Ba. 28. 2. Litt. 24. 2. Ba. 375.

An infant even in ~~under~~ no more may be an extra
 9. Ba. 977. Howell 105. Godolp 109. 1. Com. 225. Off. Ex. 108. 307.

In this case if more than one child is born, they are
 all extra. ut Supra.

An infant can't act as extra till 17. 9. Ba. 121. 2. Ba. 381. Off. Ex. 219. 4.
 Until this age, an administrator ~~de vacante~~ minors
 is appointed. Howell 250. Howell 155. 2. Ba. 381. 5. Co. 29. 1. Foul. 76.

Regularly the acts of an extra under 17 are not binding
 & by the court sell his testator's goods - he can't assent to a
 legacy. 9. Ba. 977. Off. Ex. 219. 4. Godolp 109. 2. Ba. 377. 1. Foul. 76. s. 6. 2.

And even after 17. he is not bound by an assent to a lega-
 cy unless he has assets to pay debts. 3. Ba. 377. 1. Foul. 76.

1. Ba. 257. He is not bound by receiving debts. 2. Ba. 977.
Off. Ex. 217.

Under 17. he can't sell the testator's lease for years - tho
 he so he may sell goods to pay debts - no other than
 nor however by his order according to the 9. Ba. com.
 1. Roll. 792. 2. Ba. 977. Howell 255. 4. 2. Ba. 509.

An extra of the age of 17. is bound by his acts as extra
 if done according to the office & duty of extra - he may dis-
 charge a debt on payt. 2. Ba. 377. Off. Ex. 215. 307. 310. Howell 255.
 490. s. 6. 2. Howell 146. 452. 1. Com. 259.

But an infant extra of 17 or more is not bound by any act
 of his, to his prejudice. & c. If he has given an acquittal
 or release without recovery of payt. - so if he assents to a
 legacy when he has not assets in his hands to pay
 debts - for in these cases he would be subject to a
 deviant. 2. Ba. 377. Howell 255. 5. Co. 29. 1. Foul. 76. s. 6. 2.
 259. 1. Roll. 740.

Extr. & Attor

So if he gives a release for more than he received ^{13.} is not binding as to the excess. These acts can not done according to his office & duty as extr. 1. Bow. 259. Mod. 146. 5. Co. 27^b 2. Ba. 377.

An extr. can in no case commit a default till 21. — hence if a bond is forfeited & the infant extr. unknown on returning the principal, tis no bar at l. to an action for the penalty. 1. Ho. 927. 1. Bow. 249. 1. Post. 76. 7. 2. Ba. 973. 1. Roll. 790.

Infant extr. tho 14. must when sued ^{appear} act by guardian like other infants or tis error. they can't take an atty 9. Ba. 110. 1. Roll. 287. R. 130. Bro. 420. 441.

The reason is they have no remedy v. an atty for mispleading, or tis id for neglect — but as a guard. they have. 9. Ba. 150. Bro. 164. 1. Mod. 59.

If he sues by an atty tis id to be error tho judgt is for him. 9. Ba. 150. 3. Bult. 180. Cantua. 1. Roll. 288. Bro. 541.

This distinction is probably founded on the R. that attor can't act till 21. But if an infant & an adult are extr. they may both sue by atty. For the atty may make an atty for the infant — tho if they are sued the infant extr. must appear by guard. 9. Ba. 154. 1. Roll. 288. Bro. 337. South. 124. 1. Post. 101. 2. 1. Mod. 57. 72. 296. 297. 298. 785. 786. 787. 3. Mod. 296.

Infant dfts may be made liable by mispleading for costs &c de bonis propriis for which he has no remedy in the atty tho he has in the guard. But an infant pth is never liable for costs. Str. 134. 9. Ba. 154. 1. Roll. 287.

By our stat. an infant may make will at 17. & therefore

he may be an extra at the by another stat in con. every
extra must give bonds. H. Bom. 168.

Some bounds.

They may be extra according to the L of spiritual ch.
i. e. the canonical L. She is considered as a person who is ca-
pable of ruling & being ruled alone, & taking upon herself
the office of extra without the consent of her H. 2. Ba. 378.
H. Ba. 202 281. 291. God. 110. 1. Bom. 295.

But by L. L. she can't without her H's consent. 2. Ba. 378.
And. 117. H. Ba. 209.

she being the L. L. controls the spiritual ch. in this can-
fence if the H. disputes she can't act. & if a spiritual ch.
would compel her to accept, a prohibition would be issued.

So on the other hand the H's consent is necessary. the H.
can't compel her against her will. 2. Ba. 378. God. 109. 110.

But if he actually administers she is bound by his act
during overtime - so that if during mass. an action is
brought in time, she can't plead ne unques ex - & if she
administers without ^{& they are sung} in consent, she is estopped from
pleading ne unques ex. 2. Ba. 378. God. 110.

If a person is named ex & married before she inter-
meddles with the pute, & the H. administration, this is such
an acceptance as will bind her, so that she can't refuse.

Lucas. She is probably supposed not to have defrauded
of some count ex may be so without the H's consent

make a will or rather a testament of such goods as she has as extra. 2. Ba. 278. 57. Off. Ex. 178. 9. God. 110. 1. Roll. 608. Contra. 1. Mod. 211. 212.

It is not disputed but that she as extra, may make an extra of the goods she holds as extra. 2. Ba. 59. Mod. 530. And. 92. 1. Roll. 608. 912.

This seems much the same as making a testament - for the extra shall as such have the disposition of the goods.

King. In Eng. the king may be an extra - but he may nominate others to execute the trust & they may be used as representatives of the deceased. 1. Com. 295. 2. Ba. 374. 4. Inst. 395. Godolph. 76.

Corporations. aggregate can't be extra in case, 1st he is a body for special purposes, & 2nd it can't take an oath to make the probate of wills. 1. Roll. 715. extra. 1. Com. 295. 1. Ed. Ray. 369. 2. Ba. 375. Off. Ex. 17. 25.

The latter reason is the substantial objection, for a corp. corporation can be an extra, because it can take the oath. Godol. 85. 2. Ba. 375.

Delinquents. According to the civil & b. l. apostates & traitors felons outlaws &c could not be extra. Godol. 85. 2. Ba. 375. Off. Ex. 17.

By the English l. no person is disabled from being an extra by any offence as the civil l. butchers, & persons attainted of treason can be extra - because they don't act in their own right. 2. Ba. 375. 6. Litt. 128. 1. Roll. 715. 1. Her 185. But they can't make wills for their goods are forfeited. 2. Pl. 599. Com. 261.

Persons excommunicated can't be enter - being excluded from the church, they can't dispose of the goods in their own disposal. 2. Ba. 375. 60. Silt 134.

This is the only instance of disqualification on it seems by the English L. arising ex delicto - here we have nothing to do with excommunication, & I suppose there is no disqualification arising ex delicto.

Aliens by the English L. may enter or adter - seems by the civil L. - except in case of military testament that are governed by the five gentes. 1. Bon. 295. bro. 6. 5. 2. ff. de. 22. 17. god. 36. 1. 4. 417.

Can an alien enemy enter maintain an action as enter? It seems that he can hold the effects - The authors are various on this subject, tho the better opinion seems to be that he can. 2. Ba. 375. 6. bro. 6. 142. 689. Moor. 596. Skin. 370.

Idiot nor banatic are able by the English L. to be enter or adter - for they can't execute the trust or determine whether to undertake it. 2. Ba. 376. god. 36.

So if an enter becomes non compos administration may be committed to another. Rac. vs. Salk 36.

A procurator can't refuse probate to any one because he is poor or insolvent - for he derives his duty from the testator. 2. Ba. 376. 1. P. W. 2. Salk 36. 279. Gaith. 457. 6d. Ray. 961.

For can the procurator in the spiritual it demand & execute of the enter or pursuing the will, since the testator required none. 2. Ba. 376. Gaith. 457. 11. Vin. 389. 1. Shaw. 293.

In bon. enter & adter must always give bonds, faithfully to discharge their duty. St. Bon. 167. 2.

Exors & Adtors

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they considering an exor as a trustee will compel him as all other trustees to give security if insolvent -
2. Ver. 259. 2. Ba. 977. South. 588. 1. Moor 224.

So where the exor the not insolvent is waiting the appt they will compel him to give security - So on a suggestion of insolvency, they will order the debtors of the deceased not to pay the exor pendente lite. 2. Ba. 977. 1. Gh. Ca. 121. 75.

Who may be an Administrator?

All persons not disqualified - One can't be an actor till 21 - for he can't give bonds to the ordinary as an actor must.
2. Ba. 121. Bar. 1. 2. Ba. 981. South. 546. 7. Ed. Ray 938. Salk. 39. 1. Mod. 995. 194.

The right of addition may devolve upon an infant as next of kin - but he can't administer till 21. No one then can properly be called actor till that age.

Feme covert may I suppose be actor, with consent of the hui - for they clearly may be entitled as next of kin. - & I find no disqualification as in the case of infants. It is inferable that feme covert are commonly postponed to others from M. Recus. sub. 2. Ba. 419. 1. Com. 219. 262

If a feme sole extors manum, her H is liable, during coverture for his acts, committed before coverture even to a devastament. 1. Ba. 293. Bro. & 609. 208. 222. 658. 1. Roll. 951. Moor. 761. 1. Ed. 337.

At L. the H. in the last case is bound during coverture only - but in eqty the exors may follow the appts into the H's hands after his H's death. 1. Ba. 293. 1. Gh. Ca. 80. 1. Moor 909. 2. Do. 61. 118. So too into his exor hands. 1. Moor 909.

May not legates & next of kin do this?

Corporations aggregate cant & suppone be adtes as they cant take oath - tho I suppone noh corporations may, as in case of entes. Stat. 169.

The King an excommunicant cant be an adte - here the R. cant apply - but an outlaws may be one. So I suppone may. felons attainted, & aliens. 2. Pa. 375. Co. Litt. 124. Godol. 85. 1. Pa. 762. Co. Litt. 124. Roll. 71. 1. 144. 145. 146. 147.

I am as to an alien enemy as in entes. bro. 8. 142. 689. Mon. 31. Shen. 370. 2. Pa. 375. 6.

Idiots & lunatics cant be adtes. 2. Pa. 376. Godol. 86.

Origin of Administrators.

It has been sd that adtes belonged in King. to the spirit ual cl. 1. Dev. 158. 2. Salk. 37. 2. Pa. 377.

Othom say the King might by the old L. seize upon the goods of all intestates - as parents patruels & kinsmen - & dispose of them. 1. Co. 38. 2. Pa. 377. 2. Bl. 594.

Selden says this right belonged to the Ld of the manor. Mon. 284. 2. Pa. 377.

The jurisdiction of ecclesiastics in matters of testament & adtes, is sd to have commenced in the reign of Rich. 2nd. Afterwards the crown gave them this branch of jurisdiction except what was before granted to as a privilege to the Lds of Manors. 2. Pa. 377. 8. 2. Bl. 94. 1. Mon. 284. 2. Co. 97.

Power & Adm.

19
Unless the testator disposed of the goods to himself and
he violated his trust - This power of the ordinary does
after it the probate of wills - & not being accountable
to any one, he did as he pleased with what remain-
ed after deducting the 2 parts rationabiles to the widow
or children. 2. Bl. 494. 5.

During the early parts of the ^{new} system a man or
boy, a M. & children, could bequeath only one third
of his chattels, & action extended only to this. If he had
no M. or no children half was at his disposal - If
he had no M. nor children, he might bequeath the
whole & action was coextensive with his power of
disposal. Th. Ray. 499. 2. Bl. 491. 2. 5.

The ordinary was not bound to pay over the debts
of the intestate - but when a will was made the
testator was obliged to do this as far as he had assets. While
this was the L. the ordinary disposed of the goods
in person - he could not appoint others. 1. Bl. 495. 6.

The first check given to the power of the ordinary
was by stat. West. 2. 19. Ed. 1. that obliged him to pay
debts to the amount of assets, & also gave the creditor an
action against him. 1. Mod. 247. 2. Bl. 495. 2. Ba. 498. 449. 60 L. 111. 139.

This stat is not to be in affirmance of the C. L. but when
in this C. L. to be found. 1. Co. L. 2. Bl. 495. 2. Ba. 499.

But the surplus after the pay^t of debts still remained
with the ordinary - to remedy this, by the stat. 31. Ed. 1.
was enacted, that in case of intestacy the ordinary
should deposit the next & most lawful friends of the intestate
to administer. 2. Bl. 495. 6. 2. Ba. 494. 1. Com. 258.

This stat then is the origin of adms - & before this time

were none at: B.L. 1. Roll. 105. 6. 5. Co. 62 or 82.

Before that stat the ordinary had begun to appoint others to act in his stead. but they could neither sue nor be sued. 2. Ba. 414. 3. Co. L. ill. 193.

The reason why they could not sue even, because they were mere Ls. to the ordinary. But this stat. enabled adms appointed under it to sue ^{for debt} & be sued by others as extra might, & as the ordinary was subjected by 2. West. - but still they were not obliged to distribute after paying debt. 1. P. H. 8. 2. Ba. 415. 2. Bl. 496. 518. 1. Lev 299.

Action by whom granted.

The right of granting action; as well as writs of nulls now clearly belongs except in certain cases, to the spiritual c^{ts} in Eng. 2. Ba. 393. ⁴⁰² The. Ann. 408. 6. 1. Sid. 359. 2. Bl. 495. 1. Roll. 106.

And a will can't be given in evd in a ct of B.L. to prove a title to real propy, till proved in a spiritual ct - secus of a devise. Doug. 681. Pow. 2. 700. 108.

It has been sd that the king is supreme ordinary of the kingdom, & as such may grant action. 2. Ba. 399. Allen. 59.

But the right of the king has since been denied. - If a person dies intestate leaving no kindred, the practice is for the king to grant action by letters patent - & the ordinary admits the patentee to action. But this action is sd to be not de jure but from courtesy or respect. The ordinary may in such cases dispose of the goods in prior uses. 2. Ba. 399. ⁴⁰⁰ 5. 84. Salk. 97.

Tho the ordinary I suppose is not to appoint an adm^r. 2. Bl. 496.

Extra & Adm.

21

E.g. baron of a bastard intestate - by usage the king is entitled to all his goods. 2 Bl. 508. Salk 37. 3 P. W. 33.

In certain cases the baron have by immemorial custom, the right to grant action & prove wills but in no other way. Off. Ex. 49. Salk 51.

In bon. probate grants ad hoc - An ad hoc appointed in a neighbouring state may sue here to recover his effects. Secus in Eng. 2 Ves. 356. Why is not our R. Council? 2 H. Bl. 506. Amb. 28. 1 H. Bl. 184. 677. 688. 690. 3 P. W. 71.

Who are entitled to action?

By stat 31 Ed. 3, the ordinary is entitled to grant action to the next & most lawful friends of the intestate. These words have been construed to mean next of blood, who was under no disability. 1. Bon 261. 2 Bl. 596. 2 Co. 39^e

Yet it seems to have been always holden (stat. 29 Hen. 2 & 1. Bon. 261) that the H. was entitled to administer on his H's estate under this stat. 2 Ba. 414. 8 Co. 51^e. 1 Roll 910. Lancel. 2.

In the H. entitled to administer on the H's estate? In one case it appeared that she was & that to the exclusion of of her H's kindred. Ray. 498. 2 Ba. 414

If there were several friends of equal degree the ordinary might perhaps select the most proper. Th. Ray. 498.

The power of the ordinary was enlarged by the stat. 21 Hen. 8, which allows him to grant action to the next or next of kin or to both, & when 2 or more are in the same degree permits him to choose. Next friend & next of kin seem to have been synonymous, except the H. & widow were included in the first words. 2 Ba. 414. 2 Bl. 596. Bon. 2. 1. Bon. 261.

This stat seems to have been considered in some manner explanatory of the stat 31. Ed. 9th - tho it gave the power of presenting the next of kin to the H. or of joining them - Both subs. now constitute the L. Cov. 2. 2. Pl. 496.

This stat dont seem to give the action to the H. on the H's death, but he has always been holden entitled to it. Cov. 2. 2. Pl. 504. 1. P. W. 984.

Admors were still not liable to distribute to the kindred of the deceased, tho there has been some controversy on this subject. 2. Pl. 515. 1. Co. 118. 1. P. W. 447.

Now by the stat of distributions 22 & 23 Car. 2nd admors are obliged to distribute. But Hs who are admors of their Hs are by the 23 Car. 2nd declared to be not within the 22 & 23 Car. 2nd. 2. Pl. 515.

Hence if the H dies before action is taken, his representatives i. e. his extra or admors will be entitled to action on his H's estate, to the exclusion of next of kin in eqty & the ordinary is sd by Lovelock to be compellable there to grant it. Cov. 2. 3. 2. Pl. 504. 9. Alth. 526. 1. P. W. 981. 2.

If the H was ext^r to another person & she dies, action of the goods which she had as ext^r goes not to her H. but to the next of kin to her testator. Cov. 3. 9. Salk. 21.

By stat. 31. Ed. 3rd & 21. Hen. 8th, the ordinary is compellable to grant action of the H's effects to the widow, or to the next of kin; but he may grant it to either or to both. Cov. 2. 2. Pl. 496. 504. Salk. 36. Ar. 58. 1. Com. 261.

When the H. is dead action goes to the next of kin - of record in the same degree the ordinary may take his choice. Cov. 4. 2. Pl. 504. 496. 1. Com. 261.

This is a q. R. - the exceptions are below.

Adors when granted to 2 or more may in some instances be several, but it may always be joint. Several adors may always be granted of several parts of the goods. E. g. Adors of one part to the W. & of another to the next of kin. Ex. 4. 1. Roll. 90. 1. How. 951.

But of an entire thing as a bond of 100 £. several adors can't be appointed. If 2. are appointed they must be joint. Ex. 5. Salk. 36. 1. Sid. 100.

The degrees of kindred are ^{computed} ~~appointed~~ according to the civil £. & not by the canon or b. £. Hence children are preferred to parents - the computation from the deceased as terminus a quo don't ascend among claimants, but in defect of children, yet both are in equal degree - The order is 1. Children 2. Parents. 3. Brothers & Grandfathers &c. 2. Bl. 504. 2. Ba. 47. Ex. 4. R. 64. 527. 1. W. 41. 3. Att. 762. 1. Do. 455.

Females are entitled equally with males of the same of the same degree. 2. Bl. 504. Lovel. 4.

In computing the degrees, propinquity, not quantity of blood is regarded, therefore half blood is as much entitled as full blood. 2. Bl. 505. Hils. 74. 2. Vent. 316. 329. 425.

In case of next of kin or next friend, does the right of representation exist? The stat. do not mention representation I believe, nor do the books generally as Bl. Love- lagh &c. but it seems that according to one act, under the stat. 91. Ed. 9th, the representation does obtain as in distributions. Th. Ray. 498. 2. Ba. 414.

The order under 91. Ed. 9. is not to have been 1. Heirs & W. 2. Children & their representation. 3. Parents. 4. Brothers &

Suppose the testator died intestate as to representation.
Th. Ray. 498.

If none of these characters will accept, a co may be
 by custom an ad in Eng. - he is next claimant.
Salk. 45. 2. Bl. 408. Lov. 5.

If there is no H. or W. or next of kin, the king accord-
 ing to usage appoints or rather recommends one - &
 the ordinary appoints him officer. Salk. 97. Lovel. 5. 84.

If an ex refuses to administer, or dies intestate leav-
 ing goods unadministered upon, ad must be grant-
 ed - but in this case, the stat. 31. Ed. 9. & 21. Hen. 8. do not
 govern the ordinary - he may grant ad to the resid-
 uary legatee in exclusion of the next of kin. 2. Ba. 386.
2. Bl. 408. 1. Keil. 219. 1. Sid. 281.

The stat. 21. Hen. 8. gives it to the next of kin on the
 presumption that the deceased intended it for him
 - but the presumption is not for him - for the resid-
 uary is given to another. But may the ordinary
 appo. any other than the residuary legatee, unless
 he is disqualified? it seems not for the reasons just
 given. 2. Str. 916.

Suppose the testator died intestate as to a part, i. e. no
 residuary legatee was appointed - the next of kin would
 be entitled I presume, for as this part the can doubt
 differ from common case of intestacy. 2. Ba. 386. Dyer 972.
How. 20. Godol. 290.

If the residuary legatee who is entitled to ad it
 also dies, his next of kin, not the testator's must
 have the ad it seems. Godol. 290.

Extra & Adm.

Godol. speaks only of an extra who is a universal or residuary legatee - in default of all these cases the ordinary may appoint any one he pleases, to administer the estate. 2. Bl. 905. How. 248. Lovel. 5.

Before the stat. such an one was usually an attorney or s to the ordinary - now he is a proper admr. 2. Ba. 419. 4.

In this case the ordinary may grant letters such an one ad colligendum but then don't make him admr. but a kind of bailie or trustee to gather & keep the goods safely. Lovel. 5. 2. Bl. 905. 2. Inst. 345.

When an admr. durante minority of an infant is to be appointed, the ordinary chooses whom he pleases - as he is but a curator for the infant. 2. Ba. 374. Lovel. 15. Hold. 281. 8. Mod. 914.

By the stat. admr. belongs to the widow or next of kin or both, & on their refusal or incapacity, to some such other person as the ct shall think fit. Stat. 6 Geo. 1. c. 11. Sect. 52.

The Cor. J. Reeve thinks the H. has no title to admr. on his H. estate.

Granting admr. to the H. in Eng. is not within the stat. of Hen. 8th - yet under this stat, the H. was appointed. 1. Inst. 219.

In Eng. if a person named as an extra don't appear before the ordinary on being summoned, to accept or refuse he is excommunicated. 2. Ba. 403. 2. Godol. 60. 140.

Of transmitting Trusts. Exors.

If an admr dies his exors are not adms to the intestate. Adms must be granted anew. l. m. of ex Chap. 14. de ho-
ris non. 2. Re. 385.6.

An admr can transmit the trust reposed in him to another - it results to the ordinary, whence he received it. 1. Roll 903. God. 230. 1. Com. 251.

So if an admr dies, his admr is not admr to the first intestate - for there is no privity between the first in-
testate & second admr. 2. Re. 506.

A can have no admr unless one is appointed to his estate. The 2^d admr is to administer on the goods of the first only & not on his estate - adms must be granted anew. 1. Com. 251.

But the exor of his exor, A's exor having proved the will, is the exor of A - for the power of an exor is found-
ed on the appointment of the deceased, & this appoint-
ment is founded on a special confidence in the deceased.
1. Attk. 506. Re. 62. 179.

He may therefore transmit it to any one in whom
he has equal confidence after he has proved the will.
1. Roll 903. 2. Re. 486. 1. Leon. 275.

If J. S. dies leaving 2 exors A & B. & B. dies leaving B. his
exor - Now during A's life B. has nothing to do with
the estate of J. S. the only devours on A. 1. Com. 251.

But if after B's death A dies leaving D his exor, D is
exor to J. S. 2. Re. 505. Salt. 911. Salt. 127. 2. Re. 506.

Still the admr of A's exor is not the representative of A.

- for the acts in this case has no relation to A - there is no privity between them. 1. Bou. 251.

The acts is commissioned to administer the goods of A's estate, not those of A the original testator. 5. 60. 9.

Therefore action De bonis non cum testamento annexo must be granted. 2. Ba. 984. 6. Haugh. 182. 1. Roll. 907.

If before probate A's estate dies leaving an estate, the latter is not A's estate. 1. Roll. 907. 2. Ba. 986. Salk. 300. Dyce. 312.

Whenever therefore the course of representation in an estate is interrupted from estate to estate, by any one act, & all the goods are not administered, admission must be granted of the goods not administered by the first estate or estate. 2. Bl. 506. Stiles. 225. 1. Roll. 908.

Action De bonis non may like an original action be special i.e. of certain specified parts of the effects not administered, the rest being committed to others. 2. Bl. 506. 1. Roll. 908. Salk. 36.

If J. & S. dies leaving A his estate & A dies leaving B an interest in his estate, & action durante minority of B is granted to B, B is not the representative of J. & S. 2. Ba. 381. Bro. & 211. Hob. 288.

Of the Manner of proving Wills

The ordinary way ex officio or at the instance of any party interested, is to cite the estate to prove the will - Some say the estate may be cited by person, whether he has a legacy left him or not. 2. Ba. 404. Godolb. 68.

In bon the ~~exte~~ must appear voluntarily in 30 days.

The ordinary may request the testator's goods, till the will is proved. 2. Ba. 409. Godol. 609.

If it be uncertain whether the testator is alive or dead the fact is to be judged of by the ordinary - & if there is good presumption evd of his death the will is to be proved. G. 4. If he is in distant parts, & common sense is that he is dead. 2. Ba. 409. God. 61. 2.

But if the testator is living, the probate is void ab initio - 3. A. R. 129. 130.

The time in which a will ought to be proved is not settled by any precise Acts in Eng. It is left to the ordinaries discretion. But regularly it ought to be intimated - i. e. the existence of the will should be presumed be made known, to the proper person, within 4. months of the testator's death. 2. Ba. 409. God. 61.

There are in Eng 2. modes of proving wills. 1st In common form as when the exte presents the will without citing the parties interested - & deposes himself that tis the true & last will of the testator, & the judge on this proves it. This is sometimes done when there is no contest. 2. Ba. 409. Godol. 62.

2nd In form of L. i. e. when the next of kin & creditors are cited to be present, & witnesses are examined. All ~~supra~~

When an exte proves a will in common form, he may be compelled to prove it again, & in form of L. - viz when the first probate is in form of L.

Probate of a will in common form may be questioned

Extr^o & Adm^r

at any time within 30 years next after - occurs when
in favor of E. 29

Extr^o Refusal.

The office of extr^o being private & he being named by
the testator & not appointed by E. he may refuse to
accept in the first instance, & then action is granted
cum testamentis annexis. 2. Ba. 508. 2. Show. 282. Off. Ex. 96.

But the ord^o may compel the extr^o to prove
the will & to accept or refuse Godol. 61.

In bon he cant be compelled to prove it. Stat. Bar. 169.

An extr^o cant resign his office it being fiduciary.
2. Ba. 508. 2. Show. 282.

Nor can he refuse by any act in pais - as by a deed
that he wont accept - i. e. this alone wont bind him
- it must be by some act recorded in the spiritual ct.
2. Ba. 508. Off. Ex. 97. Moor. 282. Bro. 892.

If there is but one extr^o named & he refuses, action
cum testa. & must be granted - & the extr^o can never af-
terwards prove the will, or act in any way as extr^o.
2. Ba. 508. Haugh. 144. 1. Roll. 907. Rowd 281.

May he waive the refusal & prove the will before action
is granted?

If one of 2 or more extr^os renounces before the ord^o
& the others prove the will, the first may according to
the english E. administer at any time afterwards -
even after the death of his coextr^o - for the executorship

sums, & he is preferred to the estate of his co-estate - for
as the will is proved the ordinary law no right to
take the refusal during the life of him who proved
it - tho he may afterwards, & probate by an entitle all
to act. Salk. 9. 35. 911. 2 Ba. 405. Moor. 979. Dyer 160. Harde. 111. 7. Mod.
99. 5. 60. 28. 60. Litt. 292. * 9. 60. 97. 9. P. 11. 2 91. Salk. 377.

According to the civil l. the renunciation is irrevocable & continuous. Salk. & R. W. supra.

The ext^l refusing may release debt due to the les-
sors. \$60.28^a 96^a 60. bill. re. 112. 60. bill. 222^a b.

Is the exte who refuses must be named in every action
brought by the others. 9 Co. 37^a. 307. 4. 1 Cr. 505. 2 Da. 98. 100.

See when the action is brought in the ext. 2. Ba 996.

After an ext^a has administered he can't renounce -
for by this he accept^s - determines his exco^m & subject^s
himself to rule. 2. Ro. 408. God. 151. 2. Rom. 72. 2. Mod. 156.
1. Mat. 409. 2. Lev. 102. Off. ex. 35. 1. Roll. 105.

General Rules. 1st Whatever the extor does respecting the effects of the tithelov. & which shews an intention in him to accept that office, amounts to an acceptance & he can't afterwards renounce.

2. Any act which would make one an ext. de son test
is an adition & is deemed an acceptance. E. g. Taking paper
of the testator's goods, & converting them to the ext. use.
1 Pa. 406. 1 Roll 917. Dyer. 100. Off. Ex 44.

So taking the goods of a stranger & administering upon them, under the apprehension, that they are the testator's goods, 1. Roll. 917, R. Ba. 506.

Secus if he takes the testator's goods claiming them as his own.

So likewise if he receives debts due to the testator, or in
 hands them. 2. Ba. 406. Moor. 15. 1. Roll. 917. 18.

So if there are 2. extrs & 1 without the others consent
 takes possession of a specific chattel, bequeathed to him by
 the testator, this is an adition, for a legatee could take
 without the consent of the extr. 2. Ba. 406. 1. Roll. 917.

But if the judge in these cases knowing that the extr
 has administered, will notwithstanding accept his
 refusal & grant adition to another, the grant is good &
 the extr. can't resume the office. 2. Ba. 405. 1. Roll. 907.
 Off. Ex. 40. 51.

Yet if after adition is granted only because the extr. don't
 appear when summoned to prove the will, the extr.
 chooses to accept, he may do it & adition must be re-
 pealed. 2. Ba. 405. Off. Ex. 40. 1.

And if after the extr. has refused & adition is granted
 to another, it should then appear to the judge that the
 extr. had administered before refusal, I presume the
 judge may repeal adition & compel the extr. to accept.
 2. Ba. 405.

If an extr. appears & takes the usual oath, that he will
 execute the office & he can't afterwards renounce, for he
 has by the oath accepted, nor can the ordinary refuse
 to admit him, even tho' after taking the oath he had re-
 fused. If he dies a mandamus lies. 2. Ba. 405. 1. Vent. 295.

Of the manner of granting Action & in what
cases it is granted.

This head includes the different kinds of action - It
must be granted in writing. 1. Born. 269. Dyer 293. Shaw. 408.

It is to be granted first when one dies intestate. 1. Born.
288. 960. 39. Sta 21. Ed. 3.

Here the person entitled by L. has a ly. auty, & acts for
himself as adtor - i.e. not for another who has a superior
right. The ordinary may take a bond for due
action in all cases, even when the cur. testamento an.
nec. 1. Born. 268. 2. Sta. 1497.

It may be granted to 2 or more & if 1 dies it survives -
In this it differs from the common case of a delegated
auty - as a letter off attor to 2 persons - for on the death of
1, the auty ceases. 2. Ba. 416. 1. Born. 240. 269. 1. Nr. 514. 1. Act. 426.

Several action may be granted of several things, but not of
1 entire thing. 1. Born. 268. 1. Roll 908. 1. Ed. 101. Salk 96. 2. Ba. 416. 394.
1. Ex. 12. God 78. 1. Roll 914.

If a person is made an adtor without any limitation
or restriction he can't rescind as to a part. & ly. he
can't waive a time tho' of less value than the sum -
he must rescind it in toto or not at all. 2. Ba. 394.
Salk 927. Yelv. 123.

2. Two formerly doubted whether action could be
granted to one during the absence of the other out of
the realm. It is now settled that it may be - so too when
the procur. adtor is out of the realm. 1. Born. 269. 4. collod.
14. B. 1. Roll. 908. 9. 10. 2. Ba. 415. 2. Salk 99. Ed. (Ray. 10. 71. or 1071).

3. A transitory action may be granted, when the

nightful adto is an action or in prison. 2. Ba. 415. 1. Moil. 978.

Why in case of outlawry? for an outlaw may sue & be sued as extra & adto. 2. Ba. 397. Co. Lill. 128. Ba. title about & outlawry.

These actions cease when the absence imprisonment &c of the extra or nightful adto are removed.

4. It may be granted pendente lite of a will, to clear when the dispute is decided - formerly two doubted - now now. 1. Bom. 269. 1. Shro. 69. Punn. 429. 2. P. H. 576. 2. Ba. 415. Lovel. 192. Moor 606. Bank. 189. Contra.

5. If there is a dispute concerning the action it may be granted pendente lite. 1. Bom. 269.

The temporary adto may sue & be sued while the action continues - even adto pendente lite. 1. Bom. 269. 1. Shro. 69. 1. 917. Ed. Ray. 1071. 2. Ba. 415.

6. If the extra named refurn, action cum testamento is to be granted, not action de bonis non, for none of the goods are administered upon. 1. Bom. 298. 2. Ba. 402. Row. 279. 281. 1. Roll. 907. 18. 95. 2. Ba. 486. 2. Ba. 37. 2. 40. 2. Salk. 904. 5.

7. If the extra dies before probate an immediate action is granted cum testamento annexo, i.e. not an action de bonis non administratis. 2. Ba. 486. Salk. 904. 5.

8. If the extra dies having actually administered, but before probate, an immediate adto i.e. not one de bonis non is granted, but one cum testamento annexo - because he died before he undertook the execution of the will. 2. Ba. 486. Salk. 904. 5. 1. Roll. 987.

If one makes a will & names no exr an acte am
testa de is granted. 1 Com 258.

If an exr dies leaving goods not administered upon
an acte de bonis non is granted. 2 Ba. 988. 2 M. 986. 1 Roll. 907.

If the exr dies intestate after he has proved the will,
administration de bonis non cum testa de is granted.
4 Ba. 986. Salk. 904. 5. Here the exr has administered
in fact.

By the old l. in Eng. if the original exr or admr
had brought an action & removed judgt & died with-
out taking execution, an acte de bonis non could not
run out an execution, nor in any way take advantage
of the judgt not being pny to it. 2 Ba. 986. 3. 4 G. 2. 89.
Salk. 140. Sid. 29.

Now by stat. 17. Car. 2. § 1. Jan. 2., the acte de bonis non may
have a scire facias on the judgt when he rendered an
a verdict. 2 Ba. 986. 7. 6 Mod. 290. Salk. 322. 9. Ed. Clay. 1072.

When the exr in this case dies intestate, the testator is
to die intestate. 1 Roll. 907.

An acte de bonis non is entitled to all the real prop
of the decedent, which remains not administered &
in specie & by tenur, household goods &c. Salk. 906. ther. 159.

As to money reserved by the original testator exr & kept
by itself as such, for it can be identified. Salk. 906.

But if the original exr takes a note for a debt due
to the testator, the acceptance of the note is such an altera-
tion of the prop, that the note vests in the representa-
tives of the original exr & not in the admr de ho

vis non a. Ro. 386. 1. Vis. 479. 1. Hut. 462. 1. Roll. 980.

10th If an exte is under 17. aditio durante minoritate is granted, i.e. till he is 17. 1. Com. 250. 2. Off. Br. 307. 2. 298. 2. 299. 2. 300. 2. 301. 2. 302. 2. 303. 2. 304. 2. 305. 2. 306. 2. 307. 2. 308. 2. 309. 2. 310. 2. 311. 2. 312. 2. 313. 2. 314. 2. 315. 2. 316. 2. 317. 2. 318. 2. 319. 2. 320. 2. 321. 2. 322. 2. 323. 2. 324. 2. 325. 2. 326. 2. 327. 2. 328. 2. 329. 2. 330. 2. 331. 2. 332. 2. 333. 2. 334. 2. 335. 2. 336. 2. 337. 2. 338. 2. 339. 2. 340. 2. 341. 2. 342. 2. 343. 2. 344. 2. 345. 2. 346. 2. 347. 2. 348. 2. 349. 2. 350. 2. 351. 2. 352. 2. 353. 2. 354. 2. 355. 2. 356. 2. 357. 2. 358. 2. 359. 2. 360. 2. 361. 2. 362. 2. 363. 2. 364. 2. 365. 2. 366. 2. 367. 2. 368. 2. 369. 2. 370. 2. 371. 2. 372. 2. 373. 2. 374. 2. 375. 2. 376. 2. 377. 2. 378. 2. 379. 2. 380. 2. 381. 2. 382. 2. 383. 2. 384. 2. 385. 2. 386. 2. 387. 2. 388. 2. 389. 2. 390. 2. 391. 2. 392. 2. 393. 2. 394. 2. 395. 2. 396. 2. 397. 2. 398. 2. 399. 2. 400. 2. 401. 2. 402. 2. 403. 2. 404. 2. 405. 2. 406. 2. 407. 2. 408. 2. 409. 2. 410. 2. 411. 2. 412. 2. 413. 2. 414. 2. 415. 2. 416. 2. 417. 2. 418. 2. 419. 2. 420. 2. 421. 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So if the person entitled to aditio is an infant, aditio durante minoritate, i.e. till he attains full age is granted. 2. Ro. 381. 1. Vis. 479. 1. Hut. 462. 1. Roll. 980. 1. 981. 1. 982. 1. 983. 1. 984. 1. 985. 1. 986. 1. 987. 1. 988. 1. 989. 1. 990. 1. 991. 1. 992. 1. 993. 1. 994. 1. 995. 1. 996. 1. 997. 1. 998. 1. 999. 1. 1000. 1.

Aditio durante minoritate being left a curator for the infant, the ordinary may grant it to whom he pleases. 2. Ro. 381. 1. Vis. 479. 1. Hut. 462. 1. Roll. 980. 1. 981. 1. 982. 1. 983. 1. 984. 1. 985. 1. 986. 1. 987. 1. 988. 1. 989. 1. 990. 1. 991. 1. 992. 1. 993. 1. 994. 1. 995. 1. 996. 1. 997. 1. 998. 1. 999. 1. 1000. 1.

It is said in 2. Ro. 381 that aditio granted during the minority of an infant exte determines on her marrying a person of full age, as he becomes interested with her in her right as exte & is of age to age to act. This is denied in 2. Ro. 381. 1. Vis. 479. 1. Hut. 462. 1. Roll. 980. 1. 981. 1. 982. 1. 983. 1. 984. 1. 985. 1. 986. 1. 987. 1. 988. 1. 989. 1. 990. 1. 991. 1. 992. 1. 993. 1. 994. 1. 995. 1. 996. 1. 997. 1. 998. 1. 999. 1. 1000. 1.

If an infant & a person of full age are co^{extors}, aditio durante & is not granted to a third person, for the one of full age may execute the will - aditio to a third person would be void. 2. Ro. 381. 1. Vis. 479. 1. Hut. 462. 1. Roll. 980. 1. 981. 1. 982. 1. 983. 1. 984. 1. 985. 1. 986. 1. 987. 1. 988. 1. 989. 1. 990. 1. 991. 1. 992. 1. 993. 1. 994. 1. 995. 1. 996. 1. 997. 1. 998. 1. 999. 1. 1000. 1.

It is said that the date of full age may take such aditio & declare an exte or aditio. 2. Ro. 381. 1. Vis. 479. 1. Hut. 462. 1. Roll. 980. 1. 981. 1. 982. 1. 983. 1. 984. 1. 985. 1. 986. 1. 987. 1. 988. 1. 989. 1. 990. 1. 991. 1. 992. 1. 993. 1. 994. 1. 995. 1. 996. 1. 997. 1. 998. 1. 999. 1. 1000. 1.

If 2 infants are extors one 17 & the other 18, the former may execute the will & aditio durante &c. is not to be granted. 2. Ro. 381. 1. Vis. 479. 1. Hut. 462. 1. Roll. 980. 1. 981. 1. 982. 1. 983. 1. 984. 1. 985. 1. 986. 1. 987. 1. 988. 1. 989. 1. 990. 1. 991. 1. 992. 1. 993. 1. 994. 1. 995. 1. 996. 1. 997. 1. 998. 1. 999. 1. 1000. 1.

In this case I conclude the elder exte can't take aditio durante &c. for none but an adult can be an aditio.

If J. S. dies leaving at his estate, & at dies leaving an infant his estate, & he is appointed aditor durante &c. of B. he is not the representative of J. S. tho he acts for B. who is J. S. estate. 2. Bo. 981. Bro. C. 211.

There must be an aditor of J. S. appointed durante &c. of B. God. 210.

Of the Duty of an Aditor Durante &c. of an infant Aditor or Extra.

It is in Born. that an aditor durante &c. of one entitled to administer, has for the time all the powers of an absolute aditor. 1. Born. 250. 1. Roll. 910.

But it seems to be established that an aditor durante &c. has not such a ly. pte. in the effects of the deceased, or such a ly. auty as extra as an absolute aditor has - for his auty is generally given him ad commodum et profectionem executoris &c. vel pro bono & commodo &c. So that he is in the nature of a bailiff to the infant extra or aditor. 2. Bo. 981. 5. Bo. 299. Bro. C. 717. 1. Born. 250. 3. Leon. 108.

These auties relate to the auty of an aditor durante &c. of an infant, entitled to adition. The auty of such an aditor is generally granted ut supra, commodum &c. pro bono &c. but not always.

Yet tho his auty is special he may generally do all acts which are incumbent on an extra, & which are in legal presumption for the benefit of the infant & the estate of the deceased. & he may assent to a legacy if there are other assets, sufficient to pay the debts but not otherwise. 2. Bo. 981. 5. Bo. 299.

An exor may appt under any circumstance tho at his
funil. 9. Ba. 487. 2. Do. 486.

So he may sue & be sued. 2. Ba. 381. Bro. 8. 719. 6. Co. 87 $\frac{c}{2}$

But as he can do nothing to the prejudice of the in-
 fant. he can't sell the goods of the deceased, except for
 the payt of debts, which is a case of necessity, as un-
 less they are funil abt. 5. Co. 26 $\frac{c}{2}$. Bro. 8. 719. 3. Leon 278
 2. Ba. 381.

A bailiff may also sell for the payt of debts. 9. Leon.
 109. 1. Com. 210. 2. Ba. 381.

He can't leave a term vested in the exor or adto.
 Com. 4. 18 ut supra. 5. Co. 29 $\frac{c}{2}$. 6. Co. 67 $\frac{c}{2}$

There is an exception to this. A when the adtoe deum
 to be is granted generally i.e. not ad corn mortuum. Then
 he leaves a term vested in the exor & it is good till the
exor is 17. 2. Ba. 381. 6. Co. 87 $\frac{c}{2}$.

But tis not laid down even in this case that the adto
 may sell the goods of the deceased, except for the payt
 of debts. ut Supra.

When Action may be repeated.

It was formerly holden in some cases, that the ordinary
 could never repeat letters of adtoe once granted. In
 having executed his form. 2. Ba. 410. 1. Com. 268. 1. Sid. 179.
 1. Keb. 689. Ray. 79. Bro. 6. 48. or 645.

But is now settled that it may be repealed for various causes - tho' not arbitrarily. 2. Ba. 410. Co. 18. 19. Salk 67. 1. Com. 269.

II When unduly obtained. If action is granted on the ground of supposed intestacy, when there is a valid will, or probate of it, action will be impeached or revoked. Co. 14. 43. Roll. 907.

2^d When in case of actual intestacy, tis granted to one not legally entitled to it - as to the next of kin to a feme covert excluding the H. - it must be repealed in favour of the H. Co. 18. 1. Sid. 409. 9. Salk 32. 1. Com. 269.

So if granted to a stranger when there are kinches not disqualified. 1. Com. 209. Salk 38. Co. 19. 4. Burr. 8. L. 296.

So if granted to next of kin cum testamento annexo when there is a residuary legatee. 2. Ba. 410. 1. Sid. 292. 270. 1. Com. 209. 2. Lev. 56. 1. Whitf. 128.

3. When obtained by false suggestion or any kind of fraud it may be repealed. 2. Ba. 410. 1. Sid. 299. 370. 2. Keb. 69. 72.

So when obtained by imposition on the ordinary, or when he grants action on a wrong suggestion, tho' possibly not fraudulent. St. M. Co. 19.

4. So if obtained in an irregular manner or without citing the parties required by L. to be cited. 1. Com. 269. 1. Lev. 308. 4. Burr. 8. L. 296. Co. 19.

So if obtained without giving security to account on within the 14. days. 2. Ba. 410. 2. Keb. 64.

So if after action is granted, a new action is obtained

by fraud, without a repeal of the first, & the 2nd adte nullius, his adition must be repealed - his nullius are void. 1. Born 264. Dyer 299. 6. Bo 192.

II. Adition duly obtained may be repealed by consequence of matters or post facto - as if the original adte should become a lunatic or otherwise incapable. 1. Born 209. 1. Les 158. 1. Sid 979. 1. Mob 846.

So e contra if the person legally entitled, is incapable at the testator's death, & adition is for this reason granted to another, this last adition may be repealed on the former becoming capable. Bo 16. 19. 4. Burns & L 236. 1. Born 209. 1. Sid 372. 9.

Adition too may be repealed without a sentence of revocation, as by granting a new adition. Bo 19. 4. Burns & L 237. Bro 8. 46. 1. Sid 971.

Of the consequence of repealing adition.

It is a p. d. that when the objection to an adition granted is, that it is to a wrong person, the grant is voidable not void. ^{1. Bo} 688. Salk 48. Born R 46.

If the adition is regularly granted tho to a wrong person, & is afterwards repealed by a citation to the ordinary, all the intermediate acts of the first adte are good. As if he give the goods of the intestate to another - for this lawful - to such as a rightful adte may do. 1. Born 264. Howel 50. Bro & 460. 6. Bo 18. Moore 969.

In this case if the first adte was a citation to the intestate he may retain like any adte to satisfy his debt. Bo 19.

But if an aditor whose letters are repeated by citation, makes a gift of the intestate goods by bond, before the repeal the gift is void as is the debtors but good as the subsequent aditor. 6 Co. 13th Level. 50. H. 13. Ed.

Yet in the last case if the first aditor is not drawn on an appeal to a higher ecclesiastical cl, the intermediate act of the first aditor i.e. between the appeal taken & the repeal, are I suppose void. 3. Bl. 64. 3. T.R. 128.

A repeal on citation is only a revocation of the former letters of aditor, but don't affect the original sentence - but a counter sentence on an appeal acts directly on the sentence appealed from, which is suspended by the appeal itself, & after a repeal is considered as not having existed. 6 Co. 13th Lev. 50. Bro. 8. 460. 3. H. 206. 7. 3. T.R. 129. 130. 1. Com. 264.

Now this R is in bar Mr. A. thinks doubtful. Th. Ray 224. 2. Bro 90.

As the cases in 6 Co. 13th & Ray 224. when the appeal was after an affirmance on citation.

If the first aditor in the last case had obtained judgment as a dr. of the deceased before the repeal, the aditor may be relieved as it by an audita querela. 1. Com. 264. 1. Bro. 198. 2. Saund. 149. 1. Mod 64. 2. Ba 412. 2. H. 668. 10. Mod 21. 289.

If the debtor is taken in execution on this judgment, he may be discharged on motion. 3. Ch. 49. 2. Ba 412. Knowl. 11.

Action granted by wrong aditor is void. Salk. 78. 38.

Agreeable to the R. that an appeal by citation don't make void intermediate acts, it has been decided that if one dies intestate, & a will is forged & sworn as his, &

this probate is afterwards revoked on citation ^{action} is granted, all acts that a rightful admr might have done are good. B. G. of exte who found the supposed exte is not obliged to pay the proper admr. 3. T.R. 129.

But the R. that after a repeal on citation, all lawful acts ut supra remain good, applies only to cases of actual intestacy, not where the deceased left a valid will. 1. Com. 264. 2. Ba. 411.

If the deceased has appointed an exte, and the ordinary ignorant of this grants action, & the exte afterwards proves the will, he shall avoid all moneys done by the admr. 2. Ba. 411. 1. Com. 298. 264. 1. Show. 411. Dow 277. 280. 2. Lev. 189. 2. Jones. 82. 2. Anderson 150. 1. Vent. 909.

For the exte has an interest of which the ordinary could not deprive him - the ordinary had no authority to grant action - for he can't grant but in cases of intestacy - the action is void. Justice Butler seems strongly to disapprove this R. 3. T.R. 130. 1. Bovel 47 177. Salk 480. Co. Bay 110.

So if the deceased left 2 wills the former of which was kept the latter, & the exte of the former knows it, yet on the probate of the latter by the proper exte, all the moneys acts of the first exte are void. Roll 919. 2. Ba. 411. Com. R. 182.

Justice Butler & Grop deny this R. 2. T.R. 130. They cite 2. Lev. 90. 1. Lev. 188.

Summum non est 2 last cases of intestacy. 2. Ba. 411. 412.

When the first action is repealed on citation, the authority of the first admr ceases on the repeal, & he is liable for all the acts in his hands to the rightful admr & also for unrepaid ones. 2. Ba. 412. 2. Sand. 197. 1. Com. 264.

But his lawful acts during the citation as well as before are good. Salk. 38. 6. Co. 18^b.

The effect of an adition being ab initio void, as of its being so by a repeal or an appeal, is that all the acts of the first aditor are considered & may be treated as the acts of a stranger. E.g. He may be sued as a trespasser. 2 Ba. 411. Row. 279. 1 Com. 264. 298. 2. Chudm. 150.

Yet in the last case if the exte has paid legacies, debts or funeral charges, which the negligent exte ought to have paid, he shall recover the amount so paid in damages - i.e. reclaim or be allowed so much in mitigation of damages. 2. Ba. 411. Row. 279. Title. 938. 1 Eg. Co. 326. 126. 1. Kent. 494.

So in those cases when the adition is void, or made so, a voluntary payt of debts to the original adte, don't discharge the debt, even tho a release is given - he must pay it over again. 2. Ba. 411. Row. 279. 1 Com. 264. 1 Kent. 349.

Justice Buller concludes in this R. in case of a repeal of adition, on the probate of a will - tho not in case of a repeal of any kind, upon an appeal. 4 T.R. 190^l.

But it has been holden that if a debtor pay money on a judgt & execution, to one who is exte de facto, & has ing a probate under seal, he shall never be compelled to pay it again. So doubtless if paid to an adte &c on a judgt &c. 2. Ba. 411.

Where there is the necessity of an audita. &c. 1. Ba. 198.

If after adition is granted, a new adition is granted by grants, without a repeal of the first & the second adte releases, & this adition is repealed, the release is void.

Extra & Adm. 43

1. Born. 264. 2. Bo. 192. Dyer 32. Lucas on Lo. int. 6. Bo. 192.

What Acts an Extra may do before Probate.

An extra derives all his interest from the will - the party of the testator's effects is vested in him before probate on the death of the testator. Proving the will is called a receptor. 2. Ba. 402.

It is more properly a necessary act of the extra right 2. Ba. 412. 2. Bo. 507. 1. Barn. 298. How. 258. Off. ex. 93. 1. Roll. 917. Godol. 144. Bo. Litt. 292. 1. Atk. 560. Bo. 1729.

Hence a plea that the ftt who serves as extra has not proved the will is bad - it should be that he is not extra - then he must produce the probate. Hut 91. 2. Ba. 496. Salk 916.

This act of the extra right - viz. probate, is necessary to or for or the probate, there is an inventory exhibited, & other acts to be done which are for the benefit of extra & legates. 2. Ba. 412. Salk 309. Hut 30.

As therefore the extra derives his right from the will. he may do many acts before probate that will be valid. 1. Born. 238. 2. Ba. 412. 3. Off. Ex. 39. Godol. 144.

But an extra can do no act that will be valid, till letters of adhesion are granted - for he derives all his authority from the appointment of the ordinary. 2. Ba. 412. 2. Bo. 507. Bo. 123. Skir. 87. Salk 303.

By valid acts are meant such as affect only or claimants. There are indeterminate acts which any person may do - to g. the extra may before probate, take profits of the

testator's goods, & may enter the heir's house if he can without breaking, & take securities belonging to the testator. 2. Ba. 412. Lov. 173. God. 144. 2. And. 277. Injunction 177. Off. Ex. 33.

But he must not even break an inner door - he can't even break a chest. Lovel. 173.

So before probate he may affect to a legacy, & the affect is binding - & vests the interest in the legatee. Pak. A. 576. 2. Ba. 419. Off. Ex. 34. 49. 1 Com. 238. God. 144. 60. Litt. 272.

So he may pay debts & legacies, receive debts & give releases, & take them. 2 Ba. 419. Off. Ex. 37. 49. And. 31. 1 Com. 238. How. 281^a & Co. 28^a Lov. 174. 2 Co. 99^a Co. Litt. 272.

But if one entitled to action should receive debts & give releases, before action granted, he might after obtaining action recover again - for the right of action was not in him. Moor. 119, 126. & Co. 28^a.

So an executor may before probate sell, give away, or otherwise dispose of the goods of the deceased - never in the case of action. Ba. 419. Lovel. 174. Off. Ex. 34. 37. 49. 1 Com. 238. How. 280.

So if a bond of the testator is conditioned for payment at a certain day, which happens after the testator's death, but before probate, it must be paid at the day to the executor or the penalty is forfeited at 60. 2. Ba. 419. Off. Ex. 34. Lov. 174.

So on the other hand if the bond was made by the testator, the executor must pay it at the day the before probate, or the penalty is forfeited 2 Ba. 419. 3. Co. 691. 2. Lovel. 174.

Extr. & Adm.

45.

A person named extr. is sd to be one to all intents
& purposes, except that of bringing actions - this he
cant do till probate. Salk. 901. 1. Co. 28^d. Lov. 174. 3. Row. 258^d
280^d 281^d. 2. Co. 39^a 10. Co. 52^a 60. Litt. 292^d Off. Ex. 31. 1. Mod. 259.
2. Do. 146. Godol. 159.

But even this restriction is to be taken with 2 im-
portant qualifications - it indeed seems to be more
narrowly expressed - for it dont apply at all except to
2. bars - viz. to actions of debt & to other actions on
the testator's contr. & to such actions for torts as occur-
ed during the testator's lifetime. Lov. 174.

Therefore he may before probate maintain trespass
trespass replevin &c - for injuries done to the effects af-
ter the testator's death, since in this case he may de-
clare upon his own paper. 2. Ba. 419 4. 441. Off. Ex. 35 80.
Lovel. 174. 1. Com. 298. 2. Bult. 268. Yelv. 33. 89. 145. Salk. 902
907.

He may indeed in this case maintain an action
in his own name, without describing himself as
extr. Lov. 174. 2. Ba. 419. Benth. 154.

Here a profert of letters testamentary is unnecessary
2. Ba. 441. 6. Mod. 92 1. Mod. 62. 3. 2. Keil. 668.

So before probate he may distress or avow for rent
when a reversion of a term for years comes to him
from the testator - & rent accrues to him after the
testator's death, because the rent accrues after the
reversion is vested in him. Secus if the rent accrues
during the testator's life. Salk. 909. 3. Lov. 174. 2. Ba. 419.
1. Com. 298. 1. Vent. 970. 1. Roll. 912.

So before probate he may maintain debt &c on

a sale of the testator's goods by himself - for here the
cont is his, not the testator's. 1 Com. 298. Lovel. 185. Off Ex. 41. 52.

With respect to the actions of debt & other actions on the
testator's debts ut supra, tis not true as id in 1 Co. 28. 260.
92 &c. that an extor cont before probate being an action
even in these cases. Tis clearly agreed that he may in
these cases commence an action before probate, but he can't
maintain the action or decide before probate. His writ
may bear date before probate - tis sufficient if he pro-
duces his letters testamentary at the time of declaring
where he must make proof. There remove the imped-
iments ab initio - 2. Ba. 419. 1 Roll. 917. 1 Com. 298. Skin 23. 9. Lev.
18. 1 Hut. 370. 2. Ray. 526. Coml. 371. Salt. 302. 3. 7.

Of Executors.

If there are several extors they are deemed in L. but as
one person representing the deceased. Their interest is
joint entire & indivisible. 2. Ba. 399. 1. Com. 250. Godol. 195.

Hence tis a J. R. that the act of one is the act of all - a sale
or gift of the assets by one is valid being considered as the
act of all. So a release by one of debts actions &c is binding.
2. Ba. 399. Lovel 21. 1. Com. 240. Off Ex. 98. Godol. 195. 1. Roll. 929. Dyer 29.
bus. 3. 347.

So if one grants all his interest in the testator's term for
years to a stranger the whole passes. Ba. Dyer. Godol. Lovel ut
supra.

So if one releases his part of debts due the testator. God. 195.

Tis different from the case of joint tenants for each extor

is possessed of the whole, there are no heirs or moiety in their possn. So one cant grant his interest in the testator's estate to his co-heir - nothing passes by the grant for each possessed the whole before. 2 Ba. 398. God. 194.

So one extor cant have an action of account for the profit of the estate as the other. 1. Com. 89. Dyer 238. God. 195. 1 Roll. 18.

But extors have a right to plead different pleas. God. 195.

Therefore a warrant of attorney to confess in judgt. is all in ill, & the judgt. will in most cases be set aside. 1. Com. 246. Str. 22. 1. Roll. 929. 2. Ba. 397. Et 5. Anne.

One of 2. adtors cant make a valid release nor convey an interest so as to bind the other. both must join for the duty of adtors is entire & joint - this R. was formerly doubted 1. Com. 240. 1. Atk. 460. Boult 21. God. 194.

There is an exception to this R. - when the adtors may sue in their own right - as trustees & clerkship on their own possn. Here they are considered as principals not as representatives. Hence one may release the right of action - 1. Atk. 722.

If 1 of 2 or more extors or adtors die, the power survives. 1. Ba. 406. 1. Com. 240. 1. Str. 2. 3. Atk. 509. 1. Com. 269. Holt. 96. 2. Vernon 514. Boult 21.

It is not that one co-heir may compel his partners to account with him in equity for a moiety of the effects. 2. Bac. 946. Sid. 43. Dyer.

It if the extors are made necessary legatees, 1 may sue the other in the spiritual Ct. for a moiety - for he is in the character of legatee. God. 119. 138. Off. ex 99. 2. Ba. 396.

4. Rule. One estate is not chargeable for the wrong of his companion, & is no further liable for assets, than those that come to his hands. 2 Ba. 395. God. 145. Off. Ex. 100. Bro. & 117.

Yet if all the estates join all in giving a receipt for money received by one all are liable at L. to enter as much as if it had in reality received each is liable for the whole 2 Ba. 396. Salk. 318.

Secus in Regis - here the actual receiver only is liable for receiving in the substance - joining is mere matter of form.

As all the estates make but 1 person in L. regularly they are all to sue & be sued. 2 Ba. 396 Off. Ex. 35. 4 T. R. 307. 1 Co. 32.

If an action be brought vs one estate, a plea that another is co-estate without averring that he has administered is ill; for if the co-estate has not administered, the plff is not bound to know that he is estate. 2 Ba. 396. 1 Bro. 161. 1 Ed. 32.

If 1 estate sue alone tis sufficient for the defd to plead that there is another estate, without averring that he has administered - because the fact is not supposed to be within his cognizance. 2 Ba. 396. 981.

In an action by estates all must join tho 1 has not proved the will, or is within age, or has refused before the ordinary. Saund. 221. 1 Co. 37. Yelv. 130. Salk. 3. Hume 17.

If an action is brought vs 1 of several estates, & he don't plead the mistake in abatement, he loses the advantage of it 2 Ba. 326. Benth. 61. arguendo.

So if 1 of 2 estates sue alone tis pleadable in abatement only

1. Saund 231. Yelv 230

If in case of 2. Exors one refuses to accept or prosecute
still he must be named. (Salt. 307. 9. Co. 37. God. 194) & there
must be a summons & reverence. The object of sum-
mons & reverence is to prevent the exor not acting, from
reversing. Then take away his privilege to the suit they
make him no party. 2. Bo. 396. 7. 2. Roll. 98. Hul. 128. 4. Ex.
16. 104. 60. Pitt. 139. Bro. 8. 652.

But if a trespass is committed on the goods of the
decedent, while in possession of 1 of several exors he alone
may sue for it - for here he need not sue as exor but on
his own possession. God. 194. 4. Ex. 105. 2. Bo. 397.

Quem habet contra in 3. Leon. 109. 2. Bo. 397, for the possession
of 1, is the possession of all. 1. Atk. 426.

Of an Executor de son Tort.

This is one ^{who} without any authority from the deceased or the
ordinary, does such acts as belong to the office of executor or
aditor. 2. Bo. 387. 2. Atk. 507. 1. Com. 265. 4. Ex. 171. God. 30. Bro. 84. 2. P. R. 99.

In general any unauthorised meddling with the assets of
the deceased, will make a stranger executor de son tort. 2. Atk.
507. 5. Co. 43. 43. 4. Ex. 151

E.g. Taking possession of the assets & converting them to his own
use - paying debts out of the assets - receiving & suing for
debts due to the deceased. & in general all acts of acquiring
possessing & transferring the assets. 2. Bo. 387. 1. Roll. 918. Dyer.
108. 152. Hob. 52. 5. Co. 39. 43.

The value of assets taken is immaterial - milchking cow is sufficient. 2. Ba. 990. Dyer. 166. 2. T. R. 100.

So paying legacies with the assets - taking a specific legacy without the extra current - or by fiddly when he is sued as extra any other plea than ne unques extra for by any other he admits himself extra. 2. Ba. 387. Godol. 91. 92. 1. Com. 264. 5. Off. Ga. 175. 1. Roll. 913.

So the widow of the deceased becomes extra de son tort by taking more apparel than is convenient for her degree. 2. Ba. 387. 1. Roll. 913. 1. Com. 264. 5. Dyer. 166.

If one stranger takes possession of the assets & delivers them to another, the latter is extra de son tort. 2. T. R. 91.

By stat. 13. Eliz. if the goods of the intestate are given by fraud to a third person, or a release given by fraud of a debt, the donee or releasee is extra de son tort. 2. Ba. 387. 1. Com. 265. Bro. & 406. 810.

If one intermeddles with assets even in pursuance of the directions of the deceased, he is an extra de son tort. 2. T. R. 97.

So a fraudulent gift of the deceased himself makes the donee extra de son tort, as to value from the necessity of the case, but not as to merit of law, legacies, extra de son tort good in them. 1. Roll. 104. 2. Ba. 608. Bro. & 271. 1. Roll. 549. Yelv. 177. 2. T. R. 597.

But one may do many acts relating to the effects of the deceased, & not be an extra de son tort. e. g. Feeding or taking care of the deceased's cattle - paying debts of the deceased with one's own money - repairing the buildings when suffering for the want of repairs - providing necessaries

Exors & Admrs

for his children. 2. Ba 388. 1. Bo. 268. Godol. 94. 2. Ab 907. 51
Doubt. 51.

Taking effects under the claim of duty unless when the
claim was merely plausible - more artifice - for here
he does undertake to act as exr. 1. Bo. 264. Dyer 166. Root 44.

Intermeddling with real estate does not make 1 exr. de son tort
even in Bo. 1. Root. 104.

What acts are sufficient to make one exr. de son tort.
is a question of L. 2. R. 92.

The true principle of discrimination is this - if the act
of the stranger is such as fairly warrants the inference
that he claims the management & disposal of the assets
he is exr. de son tort - otherwise, not. In the first can
the act be such as belongs to the office of exr. 2. Ba.
388. Moor 126. Dyer 166.

The above R. as to what makes an exr. de son tort ap-
ply in their full extent, only to cases where there is no
rightful exr. or admr. & to those where there was none
at the time of intermeddling. For after probate of the
will, or after the exr. has otherwise administered, or af-
ter admr. is granted common acts of intermeddling,
as taking paper, converting, embarking &c. would not make an
exr. de son tort. For there is a rightful exr. or admr. &
the goods taken after probate are assets in the hands of
the rightful exr. or admr., they having come to his hands.
2. Ba. 388. 1. Bo. 99. 3. Salk. 319. 19. Shuib. 282. 380.

The wrongdoer in the case is liable to the exr. or admr. as a tres-
passer. Salk. 202. 907. 2. Ba. 419. 441.

But even after probate if one not only intermeddles

but seems to be extr. or adm., he is chargeable as extr. de non test & it seems from Salk 313. that this claim may be reserved from certain acts, as to subject him - such as receiving & paying debts - tho not from common acts of intermeddling - viz. such as are in the nature of common business. 2 Ba 938, 5 Co 35^a. Salk 313. T. N. B. 44.

If the intermeddling is before probate, or otherwise guarded, he is extr. de non test. tho the act is nothing more than taking paper. & he is liable as such to estate, unless he delivers over the goods to the rightful extr. or adm. before the action is brought. 2 Ba 938, 5 Co 35^a. Salk 313. 297. 1 Roll 318. Cro. E. 565. Hob. 47.

The ground on which extr. de non test are liable to estate is that from their acts extr. have a right to presume they are legal representatives, & they have no right to disprove this presumption since their own wrongful acts have raised it. 2 T. R. 77, 2 Bl. 507, 12 Mod. 571. or 47.

An extr. de non test is liable to all the trouble of an executorship, without its profits. He is liable to be sued as extr. but can't sue as such. 2 Bl. 507.

He can't retain for a debt due to himself as either extr. or adm. may sue or collect of an inferior degree. 2 Bl. 507. 8. 1106. 2 Ba. 990. 378. 2, 5 Co 30. Moor 527. Roll 922. Cro. E. 630. 12 Mod. 441. 471, 1 born. 266. Yelv. 137. 2. Mod. 91.

But if he pays debts with his own money he may retain to the amount so paid. 1 born. 266. 1. Sid 76.

If after intermeddling he obtains letters of adm., he may retain for his own debts as extr. of an equal or inferior degree - for the letters of adm. purge the

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wrong, except that he is liable to be still sued as extor
de non tort. 1. Com. 226. St. 1006. Bart. 104. 2. West 150. Stiles.
397. 1. Roll. 923.

There is a R apparently contrary to the last - viz. that
an extor de non tort after taking letters of return, may
be charged as extor - for that he shall not discharge him
self by any thing ex post facto 2. Ra 390.1. 3. Le 198. Bro.
E. 102 305. 365. 810.

But this means nothing more it seems than that
after adtor obtained, he may be described as extor &
& for being so described he can't abate the writ, but
as to all other persons the wrong is purged at once
2. Ra 391.

The extor de non tort is liable as of course as he has assets
to the rightful extor or adtor to all extor & to ligates.
1. Com. 266. Off. Ex. 257. Bart. 104. Ex. 31. Mod. 49. 1. Roll 12. 2. Ra.
391. Level. 84.

When he is sued by the rightful extor or adtor he is de-
scribed not as extor, but as a stranger would use a common
law paper. 2. Ra 388. Bart. 103.4. Salk. 298. 1. West 397. 1. Com. 266.
St. 384. 2. Ra 389.

But if the extor or adtor is a creditor to the deceased, he may
bring debt on the extor de non tort, with the avowment
that none of the assets come to his hands. Salk. 304.
2. Ra 379. 1. Roll. 940. Stiles. 389.

In an action by extor he is named as extor generally.
2. Ra 502. Ex. 31. Yelv. 137. 1. Mod. 208. 1. Com. 266. Off. Ex. 254.
Ex. 201.

Generally he is liable only to the extent of assets in

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his hands & as vs extr he is allowed all pay^t
made to other extr in equal or superior degree. He
may plead plene administravit, & gain such pay^t in
red to support the issue. 2 Ba 507. 8. Moor. 527. s. bo 30th
Off. Ex. 130. Benth. 104.

But as vs the rightful extr or actr he can't by fldg
such pay^t bar the action - such plea therefore is bad.
- but on the g. issue he shall recover - i.e. be allowed
in mitigation of damages. the amount of such pay^t
unless, perhaps, the rightful extr is by such pay^t
prevented from retaining his own debt. 2 Bl. 407. 507.
12. Mod 441. 491. Off. Ex. 14. 179. 181. Shin. 274. s. bo. 30th Benth. 104.
2. Ba. 290. 1. Vent. 349. 350. 2. H. Bl. 23.

These lawful acts however bind the party thus disposed
of vs the

Sho the extr de son tort, is generally liable only to
the amount of assets received ut supra yet if he pleads
"extr" to an action by a extr he is liable
for the whole amount. he is liable for the whole de
mand. 1 Barn. 266. Off. Ex. 257. 2. Ba. 390. Hoy. 69. Bro. 8. 472.

And however that in these cases, when the value
of the assets received is very trifling, the extr de
son tort may be relieved in eqty. 2. Ba. 390. 1. W. 157. 8.

If he pleads in this case plene administravit, he shall
not be charged beyond the assets received. 1. Barn.
206. Dyer. 166.

If there be a rightful extr to an extr de son tort,
they may be sued jointly or severally. 1. Barn. 266. Off. Ex. 257.
Secus in the case of a rightful actr - for an extr & actr

cant be joined in an action.

At C. L. the extr & adm of an extr de son tort were not liable to extr tho they were in hry. 1. Barn. 266. 2. Mod. 299.

Now by the stat. 30. Car. 2nd the extr, & adm of an extr de son tort are liable at C. L. to extr. 2. Ba. 291. Howe 21. 4. Burns. C. L. 191.

In one instance there may originally be an extr de son tort in bon - viz. case of a gift by the decedent himself to defraud extr. This negligent extr or adm cant recover it, they being bound by the gift. 1. Roll. 549. Yelv. 197. 2. T. R. 597. Bro. J. 271. 2. Ba. 605.

Of Making Debtors Executors.

By the old English L. if a debtor was made extr his debt was discharged - the reason given in this case was (why he should not retain his debt) that he could not sue himself. Bro. B. 499. Salk. Ba. 24. Br. P. Ba. 179.

But it has since been holden that his debt is appts in his hands for the payt of debts, & legacies. L. Rb.

So that if there be other appts sufficient to pay the debts & legacies of the decedent, he may still retain his debt - for the debt is reconsidered in this case a residuum. 5. Ba. 30. 136. How. 10. Yelv. 100. Bro. B. 973. Salk. 306.

But J. R. thinks he is discharged only when he takes the residuum. There has till now been no decision recognising this principle - but a clear proof that his true one, is

that the debt of an admiror who is never entitled to a residuum is not discharged by his appointment. 1. Rot. 920. Yelv. 160. Cro. 699.

In King the creditor is residuary legatee unless there is something in the will, clearly manifesting an intention that he should be. 2. Ro. 979.

As his right to withhold part of debt, as those who claim under the stat of distributions, is founded on the idea that he is entitled to the residuum, it may be a question when he has such a legacy as would bar his right to the residuum, whether he can retain his debt as such claimants.

Of Making Creditors Creditors.

A debtor may make his creditor an creditor, & in such case the creditor will retain so much of the assets as will satisfy himself - but this must be understood when this debt is in equal ^{or higher} degree, with such creditor - otherwise he cannot retain. 2. Ro. 978. Plow. 188. Hul. 125. Godol. 115. Salk. 904. 10. Mod. 596.

So if action be granted to an creditor he may retain enough assets to satisfy himself - but this must also be confined to creditor in an equal degree. Godol. 115.

These Rs. from the nature of the case are reasonable & just - for as the creditor who first commences an action gains a priority to all others in an equal degree & as an creditor cannot sue himself, he must unless this method is pursued, be postponed to all creditors who in equal degree.

Exors & Adms

But an exor de son tort; who is a exor can't retain for this would be allowing to take advantage of his own wrong. 5 Co. 90. 2. Ba. 4. 279.

An exor is not obliged to take in part, when there are not assets enough to pay the whole debt. 2. Alk. 411.

Of an Executor's right to the Surplus.

In Eng if an exor be appointed it has been a question, to whom the surplus of final party after the payt of debts legacies &c. belong. 2. Ba. 420. Went. 4. Fall Co. 240. Br. P. Cas. 279.

Formerly the exor himself was always considered residuary legatee - but now if any considerable legacy, not appropriated to any particular purpose be left to the exor, or if there can be collected in his will an intention in the testator, that the exor should not take as residuary legatee, the ct of Eng will order a distribution as in case of action. Still however if no such intention can be inferred from the will, the exor will be considered residuary legatee. Br. P. 44 48. Br. Ch. 21. 1. Per 579. 2. Alk 47. 3. Alk. 226. 300. Roper 220. 1.

An exor in Eng. has no wages for his trouble.

A legacy bars the exor's right to a residuum in those cases only, where it affords proof of an intention in the testator, that the exor should not take the residuum. Parol proof is admissible to shew that notwithstanding the legacy, the testator intended the exor should be residuary legatee - but this R. don't hold vice versa. Roper 290. 1. Per. Jun. 265. 275.

Is so by legal reasoning that in cases of this kind, parol

proof is admissible to rebut an esty or put an implication - that is parcel proof may be admitted, to establish the old legal import of the will, or rather instrument, when such import varies from the equitable construction. Yet such proof can't in this case be admitted to establish the equitable in contradiction to the old legal construction, but the former must be collected from the instrument itself. 2. Atk. 63. 228. 3. P.W. 50. 2. Ms. H. Will. 313. 1. Ms. 453. 1. Bo. & Car. 201. 228. Fall. 250.

Of Wills.

A will is a declaration of the mind either by word or writing in disposing of an estate, & to take place after the death of the testator. Burth. 38. 5. Bo. 497.

To every will there must be an extr. 2. Bl.

A testamentary instrument not appointing an extr is called a testament. Howe. 2. 7. T.R. 146. 2. Bl.

Generally any person labouring under no particular disability may dispose of real estate by will. Howe. 140. 1.

In all cases the presumption is that he was of sufficient discretion & ability, so that the burden of proof lies on him who contests the will. 2. Mod. 313. 60. Litt. 39. Br & Car. 314. 2. Bl.

Persons of the following descriptions, can't make a will - 1. Idiots. 2. Persons of non sane memory, as Lu-

natics. 3 An aged person can't make a will if it appears from his conversation at the time of making it, that he was not of sufficient discretion. 4 If the testator was unable thro ignorance or blindness or any other cause to read the will, it must have been read to him & such reading must be proved. 5 Deaf & dumb persons can't generally make a will, but proof may be admitted to shew that such person knew the contents, & had understanding sufficient to make a judicious disposition. 6 A drunken man can't make a will. 7 Nor can an alien make a testament of goods or lands. A will made under any restraint or fear is not valid. & I would remark that in this case the cause of fear whether real or imaginary ought not to be regarded. 8 The age of discretion in making wills in this case is according to some authors 14 in males & 12 in females - others say 18. J. R. thinks it to be at 14 - because according to Ed. Hardwick the civil & governs in this respect, which say 14. 9. Roper 11.

A H. can't dispose of his H. choses in action, chattels real, or paraphernalia by will tho he may dispose of all by deed, except the first kind of paraphernalia. 9. Roper 11.

A joint tenant can't dispose of his share holden in joint tenancy, because the jus accrescendi intervenes between the right of the testator & that of the devisee or legatee.

A remainder of a chattel interest may by way of execution be limited over after an estate for life, provided that the remainder men be all in esse, at the death of the devisee, & that the contingency on which the remainder is to vest happens within a life or lives, 21 years & the fraction of a year. 2 Br. 62. 127. 99. 6 Litt. 20. 2 Rb.

The life man must lodge an inventory of the property, limited over in the deed of conveyance & if in failing circumstances must give security which will be forthcoming.
2. At 64. 179.

An estate tail can't be created in freehold property. So if it is given to a man & the heirs of his body, the absolute ownership vests in the first taker. The reason given for this R. by English lawyers is, that an estate tail in freehold property can't be barred by fine or recoveries & therefore if supposed to exist must be a perpetuity which the L. abhors.

A will of freehold property ought regularly to be in writing signed & published by the testator.

It is not necessary that there be subscribing witnesses as in case of D. of land. & the testator's name written by himself in any part of the will is sufficient signing. There is indeed an instance given by Dougl., where the testator's name was written by another person yet being approved of by the testator, was held sufficient. If the testator can't write his name, with his name written by another person is sufficient.
2. At 65.

It is also too that if the will is in the hand writing of the testator is good without signing. & so too in some cases, if the hand writing of another.

It is laid down as a G. R. that if a will of both real & freehold property, be well executed as to the freehold only, is void only as to the real. In support of this R. it is said that the intention of the testator ought not to be unnecessarily defeated, & as the will is good in part the intention as to this part ought not to be disregarded.

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Exors & Adms
This reasoning is unsatisfactory for tis not improb-
able that one part of the will was made with an
eye to the other - & that the intention of the testa-
tor would be violated by permitting the legacies to
take all the real pty, & then come in for a share of
the real.

A. B. L. Municipalities might be made of real
pty, but the restrictions imposed on them by
the stat 29 Geo. 2. have almost abolished them.

Duty of Exors & Adms.

His first duty is, to make out an inventory of all
the estate that can be aspts in his hands, & to procure
an appraisal of it by judicious persons under oath.

After this he must account with the A. of probate
for the pty inventoried, but is not liable at all
events, to pay the amount of the appraisement. If
sold for less he is not liable unless tis thro his fault
- but if tis his fault he is liable to cove. on his bond.
But if the cove. rec. in common form they must
ground their actions merely on the inventory.

If tis sold for more than the appraised value, the exs
must account for the whole avails.

A judge of probate ought not to reject an invento-
ry of pty, the title to which is disputed - for his deci-
sion cant affect the right of buying the title at G. L.

The exs is never liable to execution till he receives assets
unless he has made an unreasonable delay. Step. 472,
Howell. 22. 46. 57.

If an extor or adm submit to arbitrament & the arbitrators award us him, he can't afterwards sue the want of assets as to that debt. - If part of assets come to his hands his liability increases. 2. R. 599, 5. Do. 61, 671.

An insinual compulsion by an extor or adm on such of money due from the testator don't make the extor personally liable. 14 Bl 102. 3. 2. Do. 618.

The powers & duties of extor & adm are nearly the same - tho there is some difference. They are bound only to the extent of assets. 2. Ba 313. Went 100. Bro E. 313.

The Payment of Debts.

Here the following order must be preserved. 1. Funeral charges & the expense of proving the will. 2. Debt to the king by record or specialty. 3. Debt by particular stat. as forfeiture &c. 4. Debt of record. 5. Specialty debt. 6 Debt on simple contr. 7. O W 302. Talt 277. 2. Her 521. 2. Ba. 492.

This L. don't appear just - If debts in equal degree he may pay which he pleases first - but he can't prefer a debtum in presenti solvendum in futuro to those already payable, unless the latter are of an inferior degree. Bro. E 313. 2. Ba. 494. 3. Bro 57

If he pay a debt of inferior degree while a higher one remains, he is personally liable, recus if he did not know of the latter. 1. O R. 690. 2. Ba. 495. Plow. 277. 1. Sid. 298. 2. Shaw. 492.

A debt may gain priority to those in equal degree by what is called legal diligence. 2. H Bl 513.

Exor & Adm

A voluntary bond is postponed to all debts but pre⁶⁹ferred to all legacies. 1. Atk. 222. 60 vol. 56.

If a exor object to the pay^t of a bond given by the deceased on the ground that it was voluntary, he may by bill, bring the party into ch^g to litigate the claim at their own expense & he may make pay^t according to the decision there given.

Enquiry may always be made into the consideration of bonds when third persons are concerned.

Is the duty of the exor ^{or adm} to retain assets in his hands for the pay^t of debts in present & future. But if after this & before pay^t he becomes a bankrupt, is some what doubtful whether the exor can pursue these assets in the hands of the legatee & devisee. I think he ought to do it, as well as in other cases.

In King. no time is limited for the extinction of claims on the deceased's estate.

If the exor has paid out the whole estate & cleared the priority of claims, & is sued, he may plead plene administravit.

Legacies.

After debts, legacies must be paid. A legacy is sd to be a request of particular goods & chattels by testament. 2. Ba. 566. Godol 271. & 36.

An exor to receive a legacy is given, and proceeds himself as in the case of debts, 1. Ker. 431.

At the testator's death the immediate right of the legatee commences, tho' the legal title of the legacy still resides in the testator, & he may dispose even of a specific legacy to pay debts. The effect of the testator vests the legal title in the hands of the legatee & very slight matters may amount to an assent. 6 Will. III. c. 31. s. 1, 2. 1708, 1709.

Pecuniary & Specific Legacies.

Specific legacies are bequests of things specified - pecuniary, are of sums of money made in g. terms that don't identify any particular parcel. 3 Atk. 46. Roper. 25. 1 Atk. 91. 2. Do 688. 1 P. W. 422.

Pecuniary are liable to only before specific, but there are liable if the assets are insufficient. Roper. 25. Br. 60.

But if a part only of the specific be taken to pay debts, the legatee whose parts are not taken are compensable in chancery, to make a reasonable allowance to those whose parts have been taken. Roper. 113.

Thus A claims, however only where as necessary to take a part of the specific legacies - for if the testator take such legacy he is bound to its amount.

If a specific legacy be lost or destroyed by any inevitable accident, the legatee must bear the loss. Br. 46. Roper. 27.

After the payment of specific legacies if there be not assets enough to pay the pecuniary ones there must be an average. Roper. III. 1. 2. 11322. 528.

Ex parte D'Adda

65.

But if there be not sufficient to pay the specific legacies, those first paid are always preferred & there shall be no abatement between them.

There are cases where the pecuniary legacies are preferred to specific - but this preference depends wholly on the testator's intent. Br. Ch. 993. 4. Rep. 119.

Thus if all the real property at a particular place or places be bequeathed in specific legacies when there is no real estate elsewhere, & afterwards a pecuniary legacy is given, to be paid out of the real estate the specific legacies are chargeable with the pecuniary legacy.

Vested & Lapsed Legacies.

A vested is 1, which of course vests in the legatee or his representatives - lapsed, cannot be taken by the legatee but sink back into the residuum.

If a legatee die before the testator his legacy is lapsed. 2. Eq. 6. Ab. 216. 1 P. W. 7. 8.

The legatee who has the residuum if there be one is entitled to lapsed legacies - ^{they} ~~it~~ ^{is not} ~~but~~ ^{shall} go according to the rule of distributions. 2. Ver. 201. Level 206.
2 Ver. 378. 821. 916. Br. Ch. 200. 570.

As to this there are 1 or 2 exceptions - It is decided that if the legacy lapsed by the death of the legatee during the life of the testator, it goes to the next of kin & not to the residuary legatee - but if it lapses by the failure of the condition on which it given it goes to the residuary legatee. 2. Ver. 394. 5.

A legacy given to a person payable at a future day is a vested legacy - but a legacy given to a man at a certain age dont vest till he arrives at that age, & if he dies before he arrives at it, his estate. Br. Ch. 21. 2. Eq. Ch. A. 238. Br. Ch. 20. 1. No. 542. Rep. 172. Br. 227. 1. No. 217. 2. O. W. 610. 3. Br. Ch. 1. 571. 2. Kent 452. 1. No. 462. 2. Do. 675.

This distinction seems to be over nice & probably tends to defeat the intention of the testator. The R of distinction are not however without exceptions. 2. O. W. 610.

If such legacies are charged on real propy & the legatee dies before the time at which they are payable, in one case, & given in the other they shall lapse. This exception is for the benefit of the heir who is a favour to the of the English L.

Another exception is that when a legacy given at a future time, is put upon interest it is not lapsed tho the legatee die before the time. Rep. 180. 2. No. 679. 1. Do. 662. Br. Ch. 917. 2. Br. Ch. 3. 905. 975. 1. Atk. 502. 3. Do. 658. 2. No. 269.

So also when the legacy is to be paid out of a certain sum, which yields an annual income the vested legatee will compel the heir to pay a legacy charged on his land, yet if such legacy lapses, or if it be vested & the legatee die before the day of payt, the heir will hold it to the exclusion of them who claim under the stat of distributions. 1. Atk. 512. 352. 2. O. W. 276.

The same favour is shewn to a devisee in whom the legacies are charged. The person who is entitled to a lapsed legacy, may demand payt immediately after the death of the first legatee, provided (I suppose) a year & a day be past, & no time is fixed by the testator. 2. No. 383.

A legacy may be made with a proviso, that if the legatee die before the testator, or before he arrives at a certain age, it shall go to another, & such a limitation will be good. 3. Co. 530. 2. Str. 207. 521. 611.

Conditional legacies.

If a man orders a legacy to be paid on condition not to dispute the will, & the legatee commences a suit when he does dispute it, his no objection, if there was, probabili causa litigandi. Reper. 42. 2. Ver. 11.

It is a R. that all conditions in restraint of marriage to be construed strictly being prejudicial to society. Swint. 266.

Legacies to which are annexed general conditions in restraint of marriage, are vested immediately & absolutely & the condition is void - as where the condition is that the person must marry a person of a particular profession or calling. 3. Co. 537. 1. Mod. 86. 1. Ver. 20. Str. 614. 1. Font. 292. 299.

But a legacy left by a man having a family of children to his W. on condition of her not marrying is an exception to the above R. 1. Ver. 20. 2. Mod. 86. 2. d. 52.

Yet if there had been no children & the legacy had been so given by a stranger, it would vest & the condition be nugatory, there being no good reason why a widow should not marry as well as a maid. Godol. 16.

So conditions restrictive of marriage before a certain age, or not to marry at a particular place have been considered good - as also not to marry a papist. 1. P. W. 288. 1. Font. 299. Swint. 267. 8. 1. Ver. 20.

Legacies given on condition, that they be paid in the manner without the consent of a particular person, are not subject to forfeiture on breach of the condition, unless limited to another 3. Ba. 480. 1. Vent. 199, 1. Atk. 502, Pr. 64. 569. 1. Cont. 249, 252.

When a legacy is well given.

1. A last will being made when the testator is supposed to be in his council, the L. regards his intention rather than the technical import of the words used to signify that import intention. & hence any words manifesting an intention to create a legacy do it. Godol. 280. 1. 1. Per. 467.

2. In all descriptions of persons who may claim to be legatees, the testator's intention must be sought. It has been adjudged that grandchildren may take under the description of children, if the testator had no children now in all other cases. 2. Atk. 106. 2. Per. 206.

If a man devises legacies to all his children & grandchildren, it is settled that this extends to those only, who were in life when the will was made. 1. Per. 177. 2. Atk. 112. Pr. 64. 470.

Property given to be equally distributed among the testator's relations, or among his poor relations, or among his relations of a good moral character, is to be divided according to the state of distributions, the description being too general to have any efficacy. This is now fully settled. Pr. 64. 401, Salt. 291, 2. Per. 927. 2. Per. 341.

When property is given to a number of children, to be divided according to the direction of a particular person, who is named in the will, the division made by

Extr & Adm

that person will stand unless tis manifestly unjust & 69
improper. 2. Ver. 521, 519.

I. As sd in Godolphin, that in order to discover the
testator, meaning as to the things he intended to
give away, tis necessary chiefly to regard the time when
the will was made - for tis presumed the testator's mind
is not altered unless it otherwise appears by good &
sufficient evd. In another place however he observes
that this R must be understood as the testator uses
the words in the present or future sense, & if it be
doubtful whether they refer to the time past or to
come, they shall be understood to relate to the time
to come. Godol. 272, 273.

But tis now settled that a gift in a will of all the tes-
tator's real pty, all that he had at the time of his
death & no more will pass whether the sum of his
real pty is increased or diminished after the time of
his death making the will. Swind. 513. Salt. 297. 2. Ver. 693. 688.

The R respecting real pty is directly the reverse. for
of this such a part only will pass as was the testator's
at the time of making the W.

A bequest of a man's real pty in a particular place ex-
tends to all he may afterwards have in that place.
2. Ver. 693.

By a bequest of a particular thing at a certain place, the
thing specified passes whether it was at the place or not
at the testator's death.

When a legacy shall be a satisfaction of a debt or duty.
The doctrine that obtained for more than a century in chry.

was that if a man gave a legacy to a creditor it should be a satisfaction of the debt if it was equal or superior in value to the debt, tho' not otherwise. (Roper. 168. 3 P. W. 593. 2 Do. 132. Pr. Ch. 948. 994. 1. W. 124. 6. 1. W. 117.

This R. was supposed consulted the testator's intention, & on that account long existed - but Chancellors finally began to except particular cases. & now by repeated adjudications, is abolished. The following are exceptions to the R. 1st. That the legacy in order to operate as an extinction of the debt must be ejusdem generis. 9 P. W. 226 nolo. 2 Do. 686. Pr. Ch. 994. 1. W. 521. 269. 2 Do. 509.

2. That it should be payable at the time or at least as soon as the debt. 4. Atk. 26. 2. W. 696. Pr. Ch. 296.

3. That there be no clause directing the previous pay^t of just debts. 1. P. W. 511. Roper. 168.

4. That the R. does not apply in an illegitimate -

5. That the intention of the testator to extinguish the debt by the legacy be apparent. 2. P. W. 588.

6. That it be expressly given in full.

If several legacies to the same person be exactly the same in quantity & quality & in the same instrument they are not accumulative - but if otherwise as when the same bequest is given in a will & in a codicil, is accumulative, unless some words show a contrary intention. 1. P. W. 594. 529. 2. W. B. 219. 1. Pr. Ch. 989. 2 Do. 526. Ansell. 526. 2. Atk. 646.

A legacy to a W or other person entitled to money from the testator by articles of mar. settlement, is generally

Extinguishment

considered as intended to be a satisfaction of all or in part of what is thus due, & tho the legatee may have his election as to which he will take he can have both. 3. Her. 9. 59. Co. 84. 268. 138. 1. Her. 95. 2. Do. 118. 95. 6. 250. 352. 539. 1. 2. 44. 521. 1. (Br. 84. 388).

A gift to a legatee by a testator during his life, is to be considered as part of the legacy bequeathed previous to the gift. Br. 84. 268. 1. Her. 95. 2. Do. 118.

The Ademption of a Legacy.

This is taking away a legacy which was before bequeathed - it is never to be presumed, but must always be proved. Summ. 522. 3. Ba. 570.

The accidental destruction or alienation of a legacy may be an ademption or not according to the circumstances; but is not necessarily so - for tho the legacy be specific it may be replaced by a similar article. 3. Ba. 570. Summ. 522.

To determine whether it is an ademption or not, the intention must be consulted - if he is intended to adempt it is an ademption. Th. Ray 25. 393. 39. Boult. 201. 2. Her. 84. 2. Br. 84. 608.

But if it is so lost or destroyed or disposed of that any other intention can be imputed to no ademption. If a debt be bequeathed & the testator calls it in for no other purpose than to take it away from the legatee, it is an ademption. 2. Vent. 681. Th. Ray 25. 95. 1. Ky. 60. 302.

If the thing bequeathed be pledged or sold thus successively by the testator, it is no ademption. Summ. 524. Repor. 99. 48.

But if the pay^t of a debt bequeathed was unsolicited by the testator, or if the debtor was in failing circumstances, or if the testator wanted money, tis no ademption. The exor or adm^r is answerable for the value of it. Mod. 379. Forrester. 225. 2. P. W. 322. 163. Amb. 501. 2. W. 36. 309. Roper. 38. 6 & c.

So in many cases where a legacy is devised, as in case a house is consumed by fire, & a new one is built in its stead by the testator tis no ademption. Shuib. 529. Forrester. 226. 2. W. 628. Roper. 96.

If a man by will gives his daughter £100, & afterwards or her man gives the same or a greater sum the legacy is extinguished. 2. W. 118. Br. 5h. 263.

If the testator bequeath a certain sum to one child & give in the same will the same sum to the same child again both don't go. Shuib. 530.

Tis void down however as a B to be rebutted by showing a different intention, that if the request be of goods & specified to be in a particular place, they must be there at his decease to give effect to the legacy. Roper. 97. 9. Br. 5h. 129. 4. Do. 597.

But the removal of goods out of a ship before the testator's death is no ademption. Roper. 99.

As to the Assembling & Disposing Legacies.

The exor or adm^r is not obliged to pay any legacy, till the legatee give security to refund if debt should afterwards appear - for no time is fixed within which debt must be brought forward. 2. W. 358. 2. W. 208.

If a legatee on receiving his legacy has not given accu-
sity to refund in favour of debts afterwards appearing
he is not compellable to do it. 1. Mer. 91. 60. 2. Do. 208. Lk. Ca. 145.

This R. however dont operate if the extr. when he paid the
legacy did not know of the existence of debts afterwards ap-
pearing or if he be compell'd in chry to pay them
2. Kent. 360. 2. Mer. 178. Lovel. 19^o 210. 3. Ba. 589.

J.B. thinks that in such case an action for money had
& received would lie, since the money is paid by mistake
& of course the consideration fails

An extr. may come upon the assets of a debtor in the hands
of the legatee by a bill in chry if the extr. is insolvent
but not otherwise. 2. Kent. 358. 2. Mer. 178. 1. Mer. 91. 2. Do. 208.

Pecuniary legacies abate in proportion to the deficiency of
assets. Mer. 91. Lmo. 2. 467.

If a legacy be given to an extr. for his care & pains, it has
no preference but must abate in the same proportion as
others. 2. Mer. 434.

So one legatee may compel a pecuniary legatee to refund
when the assets become deficient, tho there was no provis-
ion for refunding, & tho he has a remedy vs the extr. by
which he is compellable to pay it out of his own pocket if
he voluntarily paid away the assets to the other legatee.
Lk. Ca. 196. 248. 2. Kent. 360. Proser. 112.

Payment of legacies.

1st An extr. when he pays legacies ought to take a receipt or
proper house sufficient vouchers, because tis holden to be

such an equitable demand, as is not barred by the statute of limitations, tho' after a length of time, a legacy may be presumed to have been paid. Pr. Ch. 223. 1 Ver. J. 571. 1. Por. 256. 2. Do 21283. Roper. 101.

So he ought to be careful to pay all legacies in proper hands, for without a decree or order of a Ct of equity he can't pay them over to fathers & other relations of the infant. Ch. Ca. 240.

If without this he should pay a legacy to the father of an infant he does it at his own risque, tho' not if he pays it to any other guardian, for any other guardian gives security to discharge his trust faithfully. 1. O. W. 288. 3. Ca. 13. 9. Ca. 434. Gibb. R. 109. 1. Bq. Ca. 44. 30.

If a legacy be given to a feme covert it must be paid to the H. When a legacy was paid to a feme covert living separately from her H. it was decided in a bill brought by the H. that it should be paid again with interest. 2. Ver. 261. Roper. 96.

So where the H & W are divorced a mens & thoro, the H alone can release a legacy ^{left} to the W. Bro. & 908. 3. Ca. 438. Moor. 665. 12. Mod. 891. 2. Ver. 659.

But this R. don't apply where property is given to the sole & separate use of the W.

If no time be appointed by the testator for the payt^e of legacies, they are payable at the end of a year from his death. 1. P. W. 696. 2. Br. Ch. 39. 2. P. W. 84. Roper. 95. 2. Salt. 410.

This R. is copied from the civil L.
A legacy is payable to the representatives of the deceased legatee at the time originally fixed for payt^e. 3. Ver. 91. 199. 289.

The person entitled to a ~~bequeathed~~ legacy may demand payt^t immediately after the death of the first legatee, provided a year & a day is fixed, & no time is fixed by the testator. 2. Ver. 31. 283.

3. If a legacy be given generally it carries interest regularly from the expiration of one year after the testator's death. 2. Salk. 518. 2. Ver. 251. 262.

But if the legatee being of full age neglects to demand it at that time, he can't have interest but from the time of the demand. Pop. 68. 2. Att. 109. 2. P. W. 106. 2. Ver. 1. 967.

And here may be remarked a difference between a legacy & a debt - a debt if no time be limited for payt^t carries interest whether demanded or not. The reason of this difference is, that the creditor who is a creditor, is not like a debtor, bound to seek the person he owes - tis enough if he advances the duty when demanded. Rep. 104.

But tho a legacy be given generally & no time ascertained for the payt^t, yet if the legatee be an infant he shall be entitled to the int^{est}, from the expiration of 1 year after the testator's death even if no demand be made - for no laches shall be imputed to him. 2. Salk. 418. 1. Ver. 254. P. Ch. 261. Lovel. 209.

If the legacy be appointed by the testator himself to be paid at a time certain, it is not fully settled whether it shall bear interest from the time so fixed, or from the demand. Modern authors favour the latter principle or hypothesis. Salk. 518. Ch. Ch. 11. 161.

If a legacy be made payable to a child of the testator even at a future time, & no other provision be made for its maintenance, it will bear interest from the end of the

year immediately following the testator's death, because the father was obliged to have provided for it while living, & it is presumed he intended it should be maintained after his death. 1. Bq. Ca. c. 301. 2. Ark. 329. 3. Da. 101.

By b. s. money made payable at a certain day bears interest from the time fixed for pay.

Legacies now recoverable.

They are recoverable by a bill in the ecclesiastical cts, or by a writ in chry. If the legacy is charged on lands it is recoverable only by a bill in chry. Ed. Reg. 997. La. R. 315. 6. Mod. 26. 279. 5. C. R. 690. 7. C. R. 667. 1. H. R. 108. Mod. 149. 6. 2. 24. 9. 291. 2.

Chry compels the pay of a legacy tho ^{money} ~~the~~ on the grounds of trust. Calm. 120. Cro. J. 279, 364. 2. Show. 80.

Residuary Legacies.

When the debts & other legacies are discharged, the residuary legatee will take the surplus, to the exclusion of all others except where legacies charged on real estate are allowed for the benefit of ~~the~~ benefit of the next of kin. 1. P. H. 276. Ark. 502.

If a residuary legatee die before the debts are satisfied, so that it does not appear what the surplus will be, yet the executor or administrator of such a person will have the whole residue of the first estate, which remains over & not the rate of the first testator. South. 82.

So if there be a residuary legatee & the executor's part of the testator's effects out of the inventory, or undervalued them

Exter & Actus

he puts in. the residuary legatee may file a bill of dis-^{77.}
covery in him, before he has paid the testator's debt
3. Ba. 485. Rich. 409.

When the exte has the residuum has been already consid-
ered. But if no residuary legatee be appointed under the
will, & the intention of the testator is manifest, that the exte
shall not be residuary legatee, the residuum is distribu-
ted as tho the testator died intestate. 2. Inst. 33. 1. Per. 529. 2. Do
674. 737. 1. P. W. 9550. 9. Do. 40.

Donatio causa Mortis.

This is a specific promise made by a person in contem-
plation of death - tis always conditional - for if the donor re-
covers, the donee does not receive the party 2. Pl.

If the donor die the legal party vests immediately in the do-
nee, without the intervention of exte or any other person.

To give effect to this there must be a manual tradi-
tion or some act amounting to it by the donor.

3. B. 269. 1. P. W. 406. 441. 9. Do. 957.

Such gift is not good in exte - but no action lies in the exte
he not being entrusted with it.

J. R. thinks that the exte who claims in the donee must
bring his action in him as exte in his own wrong - for
the representatives of the deceased being bound by the gift
the exte or actus can't as in other cases inventory the party
& sue the donee to recover it.

It seems that by this gift a chose in action of a negotia-
ble nature will pass - but if tis not negotiable the better

opinion seems to be that it went happ - Quere - can't chng
protest the assignment 1. P. W. 441, 2. Do 242, 357, 3. Ark. 214,
 2. Ho. 491.

Distributions.

After payt of debts & legacies the admr must distribute the
prod prty. The mode of distribution is settled by the stat.
 22 & 23, Geo. II. which direct that after payt of debts & leg-
 acies & the widow's share, the surplus shall go to the chil-
 dren & their representatives. If there be no children, to
 the next of kin & their representatives. No representa-
 tive is admitted beyond uncles & sisters children. Coel,
 66. 73.

As the ecclesiastical tr had the management of the
 estates of deceased persons, the civil L. was adopted to
 determine who were the next of kin. The distributary
 share went in the kindred of the intestate at his death
 & consequently are transmissible thro the descendants dec
before the distribution. 2. Co. 429.

A distributary share vests in an infant in ventre sa
 mere under the stat of distributions. No distribution
 is made till after the expiration of 1 year from the
 death of the intestate. Coel. 66.

The prod estate first goes to the next of kin in the descend-
 ing line & their legal representatives, i.e. to the children &
 issue in infinitum. 2. Ho. 213, 3. P. W. 66 Pr. Ch. 28.

So long as any of the old stock remains in any of the
 direct degrees, the estate goes per stirpes, per representa-
tions - when the old stock is extinct it goes per capita.
 Some however contend that the distribution is in this

case her survivor. Lowndes agrees to the A- but J. R. supposes, that where there is no representation as in this case, the distribution can be per stirpes. Lowndes 71, Cr. Ch. 74, 2. Ba. 429, 1. Rev. 282.

Of persons related in equal degree to the deceased, no preference is given to any more than to another, except that those in the descending line include ancestors & collateral, whatever may be the degree of kindred.

In the civil & proximity in the common quantity of blood, is regarded in calculating the degree of kindred, 1. Kent. 316. 322.

The right of representation among collaterals extends no further than to the children of brothers & sisters - beyond this degree kindred can claim in their own right only. If then the brothers & sisters of the propositus be dead, & a part of their children also, those nephews & nieces who survive shall take the whole estate in exclusion of the grand nephews & grand nieces of the propositus. 1. P. W. 25. 994. 9. Do. 50. Salk. 250. 2. W. 203. 8. 1. Atk. 594. 2. R. Ch. 84.

A stat. of Jas. 2. places the mother in the same rank with brothers & sisters in the distribution of real property.

But the degradation of the mother takes place only when there are brothers & sisters of their children living. 1. Atk. 588.

No distinction is made, in distributing, between the whole & the half blood - for the civil & regards proximity & not quantity of blood. 1. Kent. 316. 322. 325. Hils. 74. 1. Atk. 582.

If the father of the deceased be living the mother takes nothing - for whatever she might take would belong to her

H. If after a divorce a vinculo matrimonii by partition-
ment, for superfluous causes, the son, die his father
& mother still living then divorced, is doubted whether
or the mother would be entitled to any thing or not -
But as the life right to her real property has ceased, on
principle it would seem, she would have a good claim
If the divorce were only a mensura & there she could
not claim any thing her life living - for her right to
her real property continues - tho after her death she might
And in all cases where the man was not at issue
void, she has a share after her life death.

It is decided in Eng. that the widow takes in exclusion of
the grandfather or mother - but is this reconcilable with
the governing Rs. 3. Atk. 726. Soul. 4. Godol. 259.

Children in ventura sa mere are by the civil as well
as E. L. considered in age & take property by the Rs of descent
& distribution - & in favour of such an infant an injunc-
tion may be granted to stay waste. Rs. 2. L. 80. 2. Atk. 119.
1. Ver. 274. 710. 1.

Distribution is complete in a act of divy. 1. Ver. 194 & the
2. Vent. 296. 962. 1. Com. 294. 2. Do. 204.

It is a g. R. that real estate is to be distributed according
to the law of the country where the intestate lived at the time
of his death. 2. H. 406. 2. Mr. 35. Amb 25.

1

Advancement.

By stat Bar. 2. every child except the heir at L. if he
has received an advancement from his father during
his life time, shall in order to be entitled to a distri-
butive share under the stat of distributions bring what

he has thus received into hotchpot. 60 Lill. 176.

This R. however operates in those cases only, where the father dies intestate as to the whole of his free P. & L. 170. Will. 446.

A marr. settlement is an advancement. 2 Will. 599. 2. Pa. 430. 2. P. W. 494. Eq. Bar. 4. 249. 2. Ves. 635.

It seems that the doctrine of advancement don't prevail in cases where a man has part of which he is ignorant, or which he don't notice in his will. P. & L. 170.

When a man gives a greater legacy to one child than to another, & dies intestate as to part of his estate, his advancement - for it must be made during the testator's life time. 2. P. W. 54.

Devastavit.

Any act of negligence by the exor or admr by which the assets are lost, or injured subjects him to a devastavit on which execution goes de bonis propriis, as receiving debts at a discount - submitting to an extrajudicial - receiving less than was due - expending an unreasonable sum for funeral charges &c. 2. Pa. 491.

When in this case there is a liab given he may be charged on it - If there be 2 exors, 1 is not liable for a devastavit of the other, unless he has directly or indirectly contributed to it. Ed. Ray. 1320.

If there be 2 exors, 1 having assets & the other not, & the former commits a devastavit, both may be sued in the first instance in the usual form - & judge may go

in both - but if no assets be found, non est & will be returned - a scire facias will go in both, & judgment will go in the receiver only.

If both exors have signed receipts, & only has in fact received, both are liable to extor but the receiver only to legatus. Salk. 318. 2. Ro. 114.

Actions by & in Exors &c.

In some cases the deceased might sue return the extor or admr can - so too as to being sued.

The R of discrimination between these cases where the extor or admr may be sued, on account of the deceased & those where can't, has been laid down thus, "that the extor or admr is liable for the costs, but not for the loss of the testator or intestate". But neither branch of this is strictly true - for there are cases in which they are not liable for the costs of the deceased, & others in which they are liable for his loss.

The present R as to costs seems to be this - if the test has benefited the deceased's estate, they are liable - otherwise they are not, even tho the estate of the family aggrieved has been injured by the loss.

J. R. however think that the enquiry ought not to be whether the assets have been benefited, but whether another has been injured by the loss of the deceased.

At l. l. the extor or admr was not liable for any loss of the deceased - their present liability is derived from the stat. 4. Ed. 3rd de donis in vita ten ratione. In the old Roll the word arboribus is not to be used

but in the printed stat. the words - "I have done this stat
impose a liability on representatives or merely give
them a right of action? 2 Ba. 549. 449. 1. Com. 241. 1. Kent 30.

When a right of recovery for the torts of the deceased
survives to the estate or actor, still, the action must not
sound in tort but in contract - & the usual mode of recovery
is by assumpsit which cannot be traversed. Camp. 372. 2. T. R. 949.
1. Kent 30. 4. Mod. 403. Latch. 314. Ed. Ray. 971. 1502.

If an action which would survive in an estate be brought in
the testator, & the latter dies pending the suit it does not abate
the suit - viz. secus, if it would not survive. If therefore
an action be brought in the testator, or a right of recovery
that would survive in the estate, & the action sounds in
tort, the suit must according to strictness of principle
abate - & the plaintiff must resort to an action sounding in contract
in the estate - & when the action as well as the right of recovery
will survive in the estate, a scire facias must be
issued to summon the estate to answer to the suit. Camp.
372. Bro. 8387. Latch. 164. 9. Co. 87.

To a scire facias in an estate, he cannot plead any matter
that might have been pleaded in the original action. Latch. 2.
Bro. 8389. 1. Sid. 182.

I have said there are contracts of the testator that won't survive in
the estate. The R of discrimination is this - "when as is usually
the case the estate is such, that the testator has received or is to receive any consideration from the other
party, on performance of the contract the estate is liable".
1. Lev. 429.

But where according to the contract the testator was not
to receive any consideration, moving from the other party,
but a compensation, arising solely from the perfor-

mance of the court, & in which the other party was not interested, if he fail of performance there must be negligence, his exor is not liable. If an officer who is to receive legal fees for the execution of a process, fails to execute it, his exor is not liable.

Formerly no action remained in an exor in the cases where the testator might his Law. Bro. & 606.

In some instances too the exor can't maintain an action which the testator could. The R is this - "if lost committed to the testator, has injured his assets, the exor may maintain a suit for the recovery of damages - otherwise he could not." 2. Bl. 445.

When the suit is commenced by the testator & is of such a nature, that it would survive in favour of the exor & the testator die before judgment, the exor may make himself a party to the action by suggesting the death of the p^lt & entering his own name in the testator's place. Bro. & 937. Latel. 164. 9. Co. 87.

By the stat of W. & M. if a d^lt die, his exor must be notified, in which event he becomes a party to the suit, & judgment goes in him as exor - but on the other hand if the p^lt was dead the exor neglected to enter his name the d^lt would be remedied.

The exor may sue in his own name when the cause of action is a debt of his own, or his accrued since the testator's death. 4. Bl. 28.

The exor when sued by a debt of his testator, is not compelled to take advantage of the stat of limitations. 1. Atk. 526. per Hardk.

But if he thinks the demand just he may furnish just to go in him, & not be guilty of a devastant.

Whether an extr is obliged to take any advantage of the stat of usury is a question about which english authors disagree. It is settled that in general he is obliged to avail himself of any illegality in the court. But no doubt but whether this reaches debts that in honour & conscience ought to be paid. Noy R. 129. Hob. 169.

The extr is not perhaps warranted in receiving all the legal advantages, that the testator might have claimed.

A count for money had & received to the use of the extr as such, may be joined with a count for money had & received to the use of the testator. 3. T. R. 589.

A pff can't join in one debt, a cause of action which accrued to him as extr, with one that accrued in his own right. 1. T. R. 489. Sta. 1271.

If that for which the extr sues will when recovered be assets in his hands, he must sue in his representative capacity. 5. T. R. 234. 7. T. R. 389.

There is the extr in all cases of this kind to sue as extr or does the R. mean that unless he sues in this way he is liable to costs? it can't mean that he is obliged to sue as extr, nor is he exempt from paying cost in all such cases. 2. T. R. 128. 3. Do. 234. 7. Do. 388. 1. St. 58. 7. Ch. J. Bar. 980.

When a promise is made to an extr as such he may sue as such. 1. T. R. 487.

If an adte bind himself as adte he is personally bound & can't plead plene administrant. 1. T. R. 671.

It is a g. R. that when an exte sees & is defeated he is liable to no costs, & by stat Hen. 8th which governs on this subject those only men made liable to costs who sued in their own right - exte therefore does not come within the stat. 2. 5Ba. 446.

The last rule applies only to p^{ty} who are exte. Hut. 69. Bro. 8. 509, Hard. 163. Rowd 189.

When an exte brings an action in his own right he is liable for costs - as in commission or trespass. 4. 652. 6 Mod. 93. 181. Kent. 92.

What things are real p^{ty} & affect inter

It is a g. R. that all real p^{ty} goes to the exte & all real to the heir - yet there are some things which seem to be real p^{ty} that go to the heir - & things that seem real go to the exte. Thus fish in a pond & deer in a park go to the heir - but had the cattle been killed they would have gone to the exte. Annual rent on land, the real p^{ty} goes to the heir - while wheat growing at the death of the testator, passes into the hands of the exte. 60. 411. 58.

The disposal of the residue of an estate per auctorem, when the tenant dies during its continuance, goes to the exte. Emblements are sometimes considered as real & some times as real p^{ty} - they pass of course by a deed of the land - & if an injury be done to them, it is a trespass - but as between the heir & exte emblements are always to be regarded as real p^{ty} - & also as between the Lord & tenant, when the estate determines at an uncertain time. Dugan as to roots, the digging of which injures the free hold - They go I presume to the exte as well as to the tenant for they are emblements. By the old & anything

affixed to the freehold, however slightly, was considered a part of the reality. Exp. 894. Rui. 35. Str. 1142

But in now the reverse. For whatever is merely appurtenant to the freehold is considered as fructus only, unless its separation would materially injure that to which it is fixed. This R as now established holds equally between land and personalty, heir & exte. 2. Re. 416. 8. 522. 5. Alk. 19.

There are certain habits transmitted by the custom of Eng. called heir looms.

If a testator or intestate has disposed of a term for years it belongs to the exte or adte. If a lease for years comes to the hands of the exte, he must annually add to the inventory, the surplus of the profits, if any after allowing for payt of rent & the R is the same as to all accruing profits bro. 6712.

If the testator seized in fee makes a lease, the rent on his death goes to his heir.

Real revenues however distant in time are real effects in the hands of the heir, & exte may in time, immediately be levied, when they shall happen. Row. 11. 125.

Expes of redemption on the mortgage of the testator, are in eqty, real effects in the hands of the exte but not adte.

If the testator grants an estate in vivum vadium, the future estate of the heir is effects real when they shall happen. If the testator be mortgaged, or recovers of an estate in vadium, the estate on his death is effects in the hands of the exte & he may compel a foreclosure. 1. Ver. 419. 1. Ch. Rep. 289. 2. Do. 220.

The heir also in this case may compel a foreclosure, if he will pay the money for which the land is pledged - but not otherwise.

The paraphernalia regularly go neither to the heir or estate - the first species never goes to the estate - the second only on deficiency of final assets. See Baron & Feme.

Administration Bonds.

The adm^r must give bonds for the faithful discharge of his trust. The extr is compellably by ~~law~~ to give caution - i.e. security he being a trustee. 2. Pa. 379. Barth 457. Ed. Ray 461. 961. Shro 294.

No person can be an adm^r before 21, because before that he can't give bonds. 5. Co. 29^a. 3. Pa. 121. Barth 446. Salk 39. Ed. Ray 389.

It seems to be the case where bonds are required of infant extrs. that they are binding notwithstanding the principles of the b. l. l. Tort 76. Cur 1802. 5. Roper 27. 6. Do 67. Co Litt 72. 316.

If the adm^r dont inventory, or makes a false account, he forfeits his bond.

But the non payt of a debt or a deviantment is no forfeiture. Salk 316.

Non distribution is a forfeiture.

Private Wrongs.

Murder.

Murder consists in unlawfully depriving a person
1st by words either written or spoken which tend
to require him an immoral assuming commission,
offense, or interest. 1. Pa. 438 & 439. 2. Pa. 438 & 439.

2^d Without words, in any picture, picture, or the
same tendency. 1. Pa. 438 & 439.

This is the most exact definition to read. Words from
him, and signs or pictures.

Murder by words is of two kinds 1st of words in
themselves actionable 2^d of words not actionable
themselves but becoming so by the 3^d Pa. 438 & 439.

The 4th Pa. respecting what murder after is written
4. Pa. 438 & 439.

Of the Murder.

Substantially & another word concern in the
definition of murder -

1st Pa. 438 that for words themselves actionable the
bill may recover for money provided the words
some exceptions for language are required and such
words, prima facie in fact murder. But the for-
mulation of murder may be rebutted by proving
that they were spoken under circumstances that
exclude the inference of murder. 4. Pa. 438 & 439.

Of the Murder.

1st Pa. 438 that using the power of violence they are

4. Ba. 588. Cro. J. 47

Words charging an intention of evil, are not actionable - facts must be charged. 4. Ba. 588. 11. Cr. 14.

A woman gave J. a sum to kiss her in an obscene manner. 4. Ba. 588.

I expect to see him indicted for stealing not actionable. 4. Ba. 588.

He is in jail for stealing a horse not actionable. 4. Ba. 588.

Words of a similar import are held to be actionable. 4. Ba. 588.

Objective words are actionable or not as they presuppose an act committed or not - 'adulterous' is not actionable - 'pregnant' is. 4. Ba. 588. 4. Cr. 14.

He is 'pious' is not actionable, unless he added in such a case, or in a reading preceding. 4. Ba. 588. Cro. J. 47. 4. Cr. 14.

As if the particular shall not be pardoned, charging one with having committed a crime of which he was then acquitted. 4. Ba. 588.

If the words charge a crime which it appears could not have been committed they are not actionable - Thus that one said J. S. got over. 4. Ba. 588. 4. Cr. 14.

This matter may be proved in law - it can be given in evidence except under the 4. Ba. 588.

As to the words charging the crime & description

the devil who is 25. 3. 1811.

So in general charging a lawyer with negligence
of his profession is actionable. 100 4. 1812. 178 1. 1811.
211. 1. 1811. 327 4. 1811. 1. 1811.

In these cases the lawyer must state for his defence
that at the time of the wrong spoken of he was a
part-time attorney. 4. 1811. 1. 1811. 1. 1811.

Proof of the plaintiff's being a lawyer is sufficient
1. 1811. 1. 1811.

So falsely calling a trader a bankrupt is actionable
- so calling him a bankrupt known not to well
be a bankrupt in two days. 1812. 1811. 1. 1811.
1. 1811.

So to charge him with cheating his customers and
to advise them not to trade with him. 4. 1811.
1. 1811. 1. 1811. 1. 1811. 1. 1811.

In actions for slander in these cases it must
appear by laying a colloquium or otherwise, that
the words were spoken with a view to his trade.
1812. 1811. 1. 1811. 1. 1811. 1. 1811.
1. 1811.

Thus he is a cheat" - by a colloquium or charging his
trade is necessary to be said - but if the words are
"he is a bankrupt" would be sufficient to prove
slander that he was a trader. 1. 1811. 1. 1811. 1. 1811.
4. 1811.

To not deal with him he is a cheat" that is, by a
colloquium

To call a doggyman a liar is actionable.

In King to change a man with penning is actionable.
11. 3. Lev. 11. 1. 181. 1. Feb. 18.

To tell a man a lie or a doggyman or a rogue - so too to
call a person a quack or a cheat is actionable. 11. 3. Lev. 11. 1. 181. 1. Feb. 18.

To say to a man that his estate is not his own is
not actionable. 11. 3. Lev. 11. 1. 181. 1. Feb. 18.

To say to a man that he is a doggyman or a rogue is
not actionable. 11. 3. Lev. 11. 1. 181. 1. Feb. 18.

To say to a man that he is a doggyman or a rogue is
not actionable. 11. 3. Lev. 11. 1. 181. 1. Feb. 18.

To say to a man that he is a doggyman or a rogue is
not actionable. 11. 3. Lev. 11. 1. 181. 1. Feb. 18.

To say to a man that he is a doggyman or a rogue is
not actionable. 11. 3. Lev. 11. 1. 181. 1. Feb. 18.

To say to a man that he is a doggyman or a rogue is
not actionable. 11. 3. Lev. 11. 1. 181. 1. Feb. 18.

To say to a man that he is a doggyman or a rogue is
not actionable. 11. 3. Lev. 11. 1. 181. 1. Feb. 18.

To say to a man that he is a doggyman or a rogue is
not actionable. 11. 3. Lev. 11. 1. 181. 1. Feb. 18.

To say to a man that he is a doggyman or a rogue is
not actionable. 11. 3. Lev. 11. 1. 181. 1. Feb. 18.

some description of time in the history of a
colloquium is necessary to the 11th & 12th. 1. 11th. 1. 12th.
1. 11th. 12th.

It is of the nature of a - as that he is a historical
1. 11th. 12th. 1. 11th. 12th.

So generally where the words are not actionable in
apt. as they refer to some relation, they are not
adulterate the meaning of the action, and to make the
words doct themselves on the part of them, and in
an account of a colloquium, in fact, not only of
why it is a historical, but a historical. 1. 11th. 12th. 1. 11th. 12th.
1. 11th. 12th. 1. 11th. 12th.

Colloquium is not by 1. 11th. 12th. It is necessary when a
word is called a historical - in general no acts for
them. 1. 11th. 12th. where the words are, the
possessive, just as a colloquium was not necessary
1. 11th. 12th.

So called a historical, no relation is to be made
1. 11th. 12th. 1. 11th. 12th. 1. 11th. 12th.

It is a historical, called a historical, not with
him, a colloquium is, in fact, 1. 11th. 12th. 1. 11th. 12th.
1. 11th. 12th.

It is the words themselves, and thus they are, applica-
tion by the making the person, in fact, in fact.
1. 11th. 12th.

The 11th is that nothing which would otherwise be
main intention, can be reduced to, in fact, by
an account. 1. 11th. 12th. 1. 11th. 12th.

It is clear that when in connection with all that
has been said, the history is to the history.

When another man is sued upon his honor.
It may be made certain only by evidence to some
thing to show that it is a crime. Dec. 64.

When another man is sued upon the honor
of a man beyond their proper import - then if
he is not a man, receiving a man full of honor is
not good. But if it had been proved that the
defendant had a man full of honor and that in a
crime concerning it, the defendant spoke these words, then
the remedy is good. 4 Co. 21. Rep. 111. B. 11. 34. 35.
Rep. 684. 875.

So he has half an acre of corn, in which, receiving the
corn that was on half an acre of corn, in which
the remedy is good. 4 Co. 21. Rep. 111.

When a man is sued upon a bad one, it is certain
that it is not good. 4 Co. 21. Rep. 111.

So if the person is uncertain upon the moral part
which is not made certain by a man's honor. Then
the remedy of J. S. is a thief. in which the
remedy is not good. 4 Co. 21. Rep. 111. B. 11. 34. 35.
Rep. 684. 875.

When an action is brought for money, tending to in-
jure in trade profession or office, it must appear
in the declaration that the money is ^{the sum of} the plaintiff was in
the office &c. &c. &c.

That the plaintiff has been wronged, and a tender is in-
sufficient. 4 Co. 21. Rep. 111.

When a man is sued upon a bad one, it is certain
that it is not good. 4 Co. 21. Rep. 111. B. 11. 34. 35.
Rep. 684. 875. That he shall be permitted to have a
tender at the time.

So in the case of a buyer and seller i.e. a trader who
guarantees his thing by it is necessary. 60p 148. 1. 291

Words of heart and passion are not to be taken
lit. 60p 520 4. Ba 522. 1. 60p 52. 1. 180.

Words that import no definite change in position
are not to be taken literally. 60p 522. 1. 60p 52. 1. 180.
is protected by the self-interest of a person of
improvement after all the action etc. words

actions of words naturally are more afterwards
are required until it is adopted - 60p 52. 1. 180.
Division - Acts of constraining words in relation
is now adopted - they are now to be understood in
that sense in which the lawyers would naturally
understand them. 60p 52. 1. 180. 60p 528 270. 10. 60p
192. 4. Ba 205. 272.

Random words in a foreign language are not
liable unless understood by the hearer. 60p 528.
1. 60p 52. 1. 180. 60p 528.

All the sentence is to be taken together - for the
present words must explain the former as not to
amount to disorder. 60p 52. 1. 180. 60p 528.

It would be violence to language, to find an unusual
meaning. 60p 52.

Thus you find a word that you find
sufficient to the word might have been given by
an accident. 60p 52. 1. 180. 60p 528.

So a forced construction shall not be given to make
words actionable, when it can be avoided.

jurisdiction to which the act itself has no immediate
participation. Exp. 509. Cro. E. 130. 158. Holt. 107. 1. Roll. 34.
1. Com. 134.

So if the person charged in such letter or articles
of complaint tho they were never exhibited in
an oath, may justly say they ~~are~~ not false
tho they are not true, for his defence is in
a court of justice. 4. Bac. 523. 518.

So he may say a witness is prejudiced, by way of
objection to his admission. 1. Com. 12. 1. Roll. 83.

Slandorous words in a complaint to a grand ju-
or, or proper magistrate, or in an indictment are
not actionable. 4. Bac. 522. Cro. E. 137. Holt. 82. 1. Com. 134.
4. Co. 14.

Tho if one falsely and maliciously and without
cause exhibits a complaint, an action for a mala-
icious prosecution will lie. 4. Ba. 508.

So in general in the case of complaint & if
the course of justice is made a mere cloak for a ma-
licious prosecution an action for a malicious pro-
secution lies. 2. Com. 10. 1. grand juror. 4. Ba. 500.
3. Roll. 126.

So slanderous words spoken by a witness in a court
are not generally actionable - tho as the case may be
he is liable for perjury, and libel. if he goes be-
yond the issue, and slander a third person. Sup-
pose he is to slander a party in their name only?
4. Ba. 529. 518. Cro. E. 130. Exp. 504. 4. Co. 14.

So if witness in testifying charges another with

Having established fairly the action in Cap. 507. 514.
1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

It is that the words were spoken by the defendant as counsel
 in a suit, is sometimes a good defense, and now
1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

When the words are pertinent to the case
 and suggested by the fact they are not actionable
1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

But if the words are impertinent, the suggestion by
 the agent, or some servant, were not suggested by
 him the action lies. 9. 30. 22. 100. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

Most of the books however make no difference whether
 or they were suggested by the client or not. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

It has been decided that for the purpose of mitigation
 of damages in favour of a client, an advocate may
 use scandalous words the not pertinent 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

In a subsequent case he holds that an advocate is
 never liable for scandalous words made use of in de-
 pending his client's cause - to his date, and to his
 and that he was influenced by his client - but will
 not admit mitigation there decisions. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

When there are two words one charging actionable
 words, and the other words not actionable, as a plea
 to the more action damages are given, and in fact
 will be awarded, and a verdict is awarded 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

Private Wrongs

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When if the words are not in one count 10.00.190.
3. 11.17.100. 4. 12.100. 5. 13.100. 6. 14.100.

The 11 in box is, if they are said to have been to
her at one time. 1. 11.100. 2. 12.100. 3. 13.100. 4. 14.100.

In an action for wrongs in themselves not actionable
special damages must be stated - this is the gist of the
action. Exp. 520 & 521. 130

So when the words are actionable, special damages
may be stated and proved - but in this case he
can prove no other special damages, than what are
related specially - he may prove general dam-
age or loss of custom in general, such general dam-
age being und. Sub. 7. Exp. 520. 130. 132. 1. 134. 58.

What amounts to an allegation of special damages.
11.100. 130. 132. 1. 134. 58. 136. 1. 138. 1. 140. 1. 142. 1. 144. 1.

But when the words are not in themselves ac-
tionable to holden that special damages may be
proved under an averment of general damages.

11.100. 130. 132. 1. 134. 58. 136. 1. 138. 1. 140. 1. 142. 1. 144. 1.

Quarried by Sub. 4. 1.

Is not material what the words that are false
are, if they are malicious and occasion special dam-
age - thus charging a single woman with being
a nut, or incontinent, by which means she loses a
match is actionable. 4. 11. 1. 130. 132. 1. 134. 58. 136. 1. 138. 1. 140. 1. 142. 1. 144. 1.

In case of abandoning a little as to the matter, as calling
an heir apparent a bastard to support to show
remote or special damage - no action is shown.

If the 1st is claimed in 1st or 2^d 4. 60. 17. Inf. 510. 511.
Ex. 1. 19. 4. 2a 17. 494. 1. 60. 17. 38.

Thus the self father had signified a design to do
 himself harm - sufficient also that the words tend to
 do himself harm. 4. 60. 17. 2 Ex. 51. or 511.

The recovery of damages is a way to another action
 for the same words, whether the words were actionable
 per se or not. Bul. 7 Inf. 519.

In actions of slander in general, the jury after having
 proved the words stated, may give evidence of other
 words of a similar kind, spoken at another time &
 even after the action was brought - these are said to be in
 aggravation of damages. Ex. 518. Bul. 10.

This however cannot be the principle, for 1st words
 not actionable may thus be proved.

2^d Words actionable which may also be proved, are
 a foundation for a distinct action.

3^d Words spoken after the action is brought, may
 thus be proved.

The true object is to show some malice. Bul. 7. Ex.
520. 2a. 691.

But when words spoken at another time are given
 in evidence under this 3^d, the jury may prove them true
 to rebut this inference. Ex. 518. Bul. 10.

When words not stated and spoken at a different
 time are proved they must be similar to those stated.
Ex. 520 says the same words - and Bul. 10. says words
 similar. Ex. 518.

See as to similar words in bon. Hivley 134.

The English stat of limitations, as to slander, requires the action to be brought within two years from the time of uttering it - the stat extends only to actionable words. 6 Cr. 519. 1. ed. 95.

Our stat limits the action to three years; it does not extend to words not actionable.

Formerly it was necessary to prove the words spoken by or to the person - it is now sufficient to prove the substance.

The manner must be the same, and the words must not be changed.

A joint ^{rule} of slander by or to two, must be 2. 2 Cr. 183.
6 Cr. 503. Sub. 5. 53. 1. com. 145. 1. 19. 1. 120. 2. 117.

Words of slander by motion & action
are actionable when spoken in public or in
market. Exp. 84. 4. 11. 116.

Written slander is a more aggravated injury as has
ing a more extensive circulation and being longer
diligently examined. 2. 11. 117. 4. 11. 118.

Exp. 404 says that a libel differs from slander by
words only in this that is delivered in writing or
printing. 2. 11. 116.

Perhaps the meaning is that words which if spe-
ken could not be slander as are not so when written
the they may be considered a libel. If this is not
the meaning, the it is incorrect.

Any malicious imputation of a person living or dead
made public by writing, tending to excite scandal
or where the object of it is to cause contempt or ridicule
is a libel. 4. 11. 116. 117. 118. 4. 11. 119. 4. 11. 120.

For words in general there are two remedies, one by
inducement and one by action. 2. 11. 116. 4. 11. 117.

To see that the if the remedy is damages apply to in
this account requires. Exp. 84. 4. 11. 117. 4. 11. 118.

But nothing is contained a libel which is necessary
in the course of judicial proceedings, as in the last
complaint, referred to. 2. 11. 116. 4. 11. 117.

The action does not lie for publishing a true account
even in a set of letters the are still character as a
libel. 2. 11. 116. 4. 11. 117.

1. A person who publishes a libelous statement of another's private life is liable for damages.

2. A person who publishes a libelous statement of another's private life is liable for damages.

3. A person who publishes a libelous statement of another's private life is liable for damages.

4. A person who publishes a libelous statement of another's private life is liable for damages.

5. A person who publishes a libelous statement of another's private life is liable for damages.

6. A person who publishes a libelous statement of another's private life is liable for damages.

7. A person who publishes a libelous statement of another's private life is liable for damages.

8. A person who publishes a libelous statement of another's private life is liable for damages.

9. A person who publishes a libelous statement of another's private life is liable for damages.

10. A person who publishes a libelous statement of another's private life is liable for damages.

11. A person who publishes a libelous statement of another's private life is liable for damages.

kind of remedy is not admissible in this case. 11-
 8 1877.

case of not understood by the person at all.

By our old common law as to the case as a
 public officer, he is not entitled to go
 to the county treasury.

Following is, respectively, as provided for in the
 improvement department of the county.

The gist of finding is now altogether immaterial - the gist of the action is conversion. Hence then the finding is immaterial and the law the practice on this and in this country to declare that the plaintiff came into possession by finding his unappropriated. 3. Ch. L. 84. 2. B. 113. 1. B. 113. 1. B. 113. 1. B. 113.

In most cases then which occur in practice the action is founded on fiction and finding is not immaterial. 1. B. 113. 1. B. 113.

Noted by some that when the conversion consists in a tortious taking, and trover is brought for it the tort is waived. Now all that is meant by this is that the tort consisted in a trespass is waived - for the actual wrong of taking is not waived - for this is the very conversion. Bac. 94. 44.

This action has now entirely superseded the old action of detinue. This action is much more remedial, for you need not be so precise in declaring, nor is the wages of it allowed in this action. 3. B. 113.

Conversion which is the gist of this action, is an assumption to dispose of, or unlawfully to intermeddle with the real goods of another as if they were one's own.

The least degree of an unlawful intermeddling with the goods of another is conversion. C. Mod. 512. 1. B. 113. 1. B. 113. 1. B. 113.

A conversion may consist then either 1st in an unlawful taking of the goods of another or 2nd in an unlawful using of them or 3rd in an unlawful detention of them - and thus are all in

we will not support the action of trespass: Inst.
57. 56. 13. 3 & 122. See L. 111.

And when a carrier of a sack of wool throws out a
pail and pulled it up into water, he was guilty
of a nuisance: & the action. This case was decided
as, 11r. 87r. 58r.

But on the same basis for the negligent disposal
of the goods of another this action would lie. For
this is merely nonfeasance. So if a person puts down
a heap of fire the more out of his house and
not in. So too where one person mules and kept
a full liver yoked in this case the 1st. In such
cases it will not lie in the plaintiff who keeps negligently
not any other action. This is not so for
here we would not be liable in trespass as we are
in some other actions. See L. 111. 8. to 146. Holt. 241. 17.
Bar. 242.

The proper action in such a case, is an action on the
case. Halk. 148. 57. Halk. 60. about a nuisance.

When the defendant is caught in taking the goods to a
place apt is concerned with known, and in such a case
the plaintiff must determine which action to bring, accord-
ing to what the goods were for. If they were for a small
sum more is the proper action, for apt will recover
only what he gave, not for.

There are cases in which trespass and waste of a incorporeal
right are all concerned. So if the defendant wrongfully
takes a road. See L. 131. 50r. 111. 1. L. 387. L. 10.
144. C. 46. 37

In the third place an unauthorized taking may be a

conversion. if one using in possession of another goods
refuse to deliver them up on a demand he is guilty
of conversion.

Now if there has been an actual conversion of the
goods there is no necessity of making a demand. If
one man is in possession of another's goods and he
uses them in an unauthorized way, this is a conversion.
But where the taking was temporary & there has been
no demand there is no conversion. 1. Sid. 254. 2. Cr. 576.
3. 2. 576.

But to justify a conversion it is necessary that the
defendant should refuse to deliver for the plaintiff's
demand, and the plaintiff must demand of a person
for it may be justifiable to refuse to deliver them
on demand. But a conversion never can be justified.
2. Bul. 112. Comp. 527. 2. 2d. Cr. 576. 10. Co. 11. 1. 2. 2. 2. 2.
2. 2. 2. 2. 2. 2. 2. 2. 2. 2.

There is one case in the 1. 2. 2. 2. 2. 2. 2. 2. 2. 2.
where it is held that there is no conversion.

Now if the jury find that the goods belong to the
plaintiff in an actual conversion & that there was a demand
& a refusal the plaintiff can recover for the goods for
this is only a case of conversion. & there is no fact to
which the plaintiff can apply the 10. Co. 11. 1. 2. 2. 2. 2.
But 1243. Hard. 22.

A finder of goods however cannot deliver them upon a
demand, on the ground that he never had them before
for he has none. 2. 2. 2. 2. 2. 2. 2. 2. 2. 2.

If one person having the goods of another puts them in
to the hands of a third person who is guilty of a conversion.

of the owner, is a common

For a servant goods by the command of the M. or to his use, the M. is liable in tort. It is not justifiable and has no value in law. 1. Mod. 257. Str. 813. B. & P. 257. 1 Will. 328.

How may maintain trover.

It sometimes happens that either a true or more person may maintain this action & this most frequently happens in cases of bailment. So if A sends cloth to B to be made into garments, B can't maintain this action, and A can, for he has the right of possession. 1. B. 218 318.

On the other hand, suppose A sends an order to B for goods, the goods are delivered to A, now if the carrier converts them, A is the proper person to maintain this action.

So if A sends an order for goods, requesting them to be sent by such a carrier - now A may have an action in the money provided he converts them.

But if the order appoints the carrier, without the request of the owner, he can maintain the action for Bailment.

There has been a question of this kind. A sends the goods of B and claims them to be his. You refuse to deliver them to him. A & recovers, tho he is not the owner. afterwards the true owner appears & sues A the goods again - the question is who shall decide.

But this is under some qualifications - for the paper must have been obtained under some colour or title of right - i.e. that it must be lawful. for a man trespasser can't maintain the action. for even a thief can't take his goods from him. Ho. 508. 912. Butler 31. 4 Shill. 131. 1707.

I then suppose one finds the goods of another in many men's houses as any one who takes them away - for he can't take lawfully. But if the goods were stolen, or taken by an act of larceny, then a man would be as any person who takes them.

The R then stands thus - some paper which obtained legally, or under colour, or colour of right and entitles him to the action.

And he will settle that a right of paper only is sufficient to maintain this action. tho there is no actual paper - for a man right of paper supposes some interest in the party.

So if the goods of A are taken from his servant A may maintain this action, for the paper by the A is paper in the R.

A right of paper is a right to the present actual paper of the goods - without this paper could be maintained.

So if a horse is stolen, to go to Bradford, the owner has not the right while the horse is performing the journey. & should be taken from the owner during the journey, the owner, not the owner, is entitled to this action. 1 Lord 175.

2. 571. 1. 2. 246. 1. 2. 246. 7. 1. 2. 246. 1. 2. 246.

To maintain this action, it must be proved that the
 plaintiff must have had property of some kind - hence when
 a creditor sent an order to have goods delivered to him
 & they are delivered to an unauthorized person, the creditor
 cannot have an action for the goods but must sue for damages
 - now if there has been a delivery to him & he has
 order - for then he may maintain the action. 1. 2. 246.
 3. 246. 1. 2. 246. 1. 2. 246.

And you will observe that a party who is wronged
 by does give a party who is wronged by the law
 now, so that this & that party of some kind is necessary
 to maintain this action, it is not enough that
 a person can show that he has been wronged
 is sufficient to maintain this.

On an indictment under this act
 it is an offence to take any property for the
 actual purpose & has a right to the property as an owner or
 person but the assignment of property is not sufficient
 to maintain this. 1. 2. 246. 1. 2. 246. 1. 2. 246.

At 6. & an offence could not maintain this
 action for goods converted during the lifetime of the
 testator or intestate - but by that statute this can be
 done now. 1. 2. 246. 1. 2. 246. 1. 2. 246.

As to the next of kin in the last case it is
 to be that an assignment that the goods of the testator
 were converted in his life time is sufficient to prove
 that the goods were taken in his lifetime for the purpose
 of this action.

Now this it is important to show the basis of the good in the lifetime of the donor was a tortious one, & this is a confession of that the the wrong the party owes, after his death. *See 69, 50, 187.*

To say that the donor's right to maintain this action is founded on his liability over to the donor i.e. the probability of his liability, for whether he is or is not liable can be determined whilst he is conversing with the wrongdoer.

It seems to be liable to no action in all events and says one it is liable in some situations *See 187, 188, 189, 190, 191.*

It has been said that a confession is a basis of the good deed and maintain this action. For if it is the foundation of the donor's right to be founded on his special need to the thing wanted. *See 187, 188.*

It is also liable to the good of a stranger; if it is in the next part to the donor it is destroyed or in the donor. *See 187, 188, 189.*

It is also liable to the donor under the basis of his right of action in the lifetime for there can be no one wronging from one wrong. If one wrong is the basis for recovery the donor can't. *See 187, 188, 189, 190, 191, 192, 193.*

It seems, however, that the donor or victim, just over the wrongdoer, over the other of his right of action, and action for the tortious.

The donor however can have an action for special damages but this must be a tortious action or the donor's

from the owner to the defendant, for the same cause
— thus, if a runaway takes a horse from A who
has hired him to go to B. — here B the bailee can
have an action on the runaway for the special
damages which he has sustained by his detention on
the road. 12th. 127. 3. 18. 1889.

The action for doing the wrong, does not depend on the
value of the action on horse — he has his election
from the runaway.

If the bailee sues for it he makes himself liable to the
bailee in the full value for he has damaged the
bailee of his property in the runaway & is liable

to act in such that he will have the special damages
bailee, more than it is lost or taken in damages
and the general damages — the action in those cases
in which the latter exceeds the cost of replacement.
A. 60. 62. 7. 1. 1. 12

Thus I think is incorrect — he might succeed in an
action on the case, tho I think he would not succeed
there.

The value of the horse is not a proper price for the
damages — for the loss of the horse — besides the value
of the horse is the loss of damages in the case.

Let us take the case of a runaway horse as found in an
action of damages — but let us see what the value is
— besides the value of the horse as a horse it is of damages for
damages on the path, which is more or less than the
value of the thing ^{lost} damaged.

The intention of the goods is the full price in the case.

of damages, the plaintiff must be entitled to recover - for
this is the principle of the case of *Wright v. Carter*, 10
Mo. 188 (1842), 11 Mo. 188 (1843).

The fact of a recovery in an action of law is not
the rule in the 1st. - the fact is not the 1st. -
the fact has been restored to the plaintiff because that gives
an indication of damages - so that a judgment in law
is not a kind of judgment in the 1st. - the 1st. is
the 1st. 188 (1842).

And as there can be but one recovery in this
law, a recovery in a damages or a good case to the
action in any other person - for the plaintiff can recover
the value of his property but once - & a recovery of a
judgment is a law the law can give no satisfaction.

It is different in courts - nothing is out of a
satisfaction - will give an action in court. 188 (1842).
the 188 (1842).

Then the plaintiff must be entitled to recover, or any law
of this, or recovery of judgment in law. the 1st. is
the 1st. 188 (1842).

By and under the law of

For the plaintiff must be entitled to recover, or any law
of this, or recovery of judgment in law. the 1st. is
the 1st. 188 (1842).

Generally it will be as any one who has taken
the plaintiff's property, or any one who has taken

of the public, & they only can manufacture the action.

But trover will lie for converting a copy of a public record because this is considered private property. Hard M. 220. D. 542.

It has been held that trover will not lie for money in specie, unless it can be identified by being in bags or boxes. But Sir J. Holt held that as this is an action for the recovery of damages, & not of the specific article trover will lie for money, tho' it can't be identified. Gray v. B. 666. and 5 B. 5. 126.
Law. 8. 418. 831.

If any one unlawfully procures money from a man, tho' his S. the Hor. Ct. may have trover for it. 1 Bul. 142.
Rich. 2. 38.

When goods are pawned, if the pawnor refuses to redeem them at the appointed time, on tender of the money, trover lies in law. 1 B. 4. 124. 1 B. 4. 124.
B. 4. 12.

But if the goods are pawned on an uncertain count the pawnor can't have trover in the pawnor till he has tendered him the money. - Also the same is inconsistent with the ^{law} for that reason all uncertain counts fail.

Now if suppose an action is brought not to enforce this count but to be relieved from it, since the pawnor don't bring his action to enforce an uncertain count but his action of trover operate as a bill in equity in this case - for us for relief. 1 B. 4. 124.

A pawned gift of goods unaccompanied by any act of

livery, do not transfer the goods, & if the owner takes possession of them, without an livery from him or him, I suppose livery then must be demanded before he can sue - for the gift of real as a lease. 12 Jac. 249, 1 Rep. 117.

A symbolical livery, or any act amounting to a constructive delivery will transfer as the delivery of the keys of a room in which the goods are, which was given in 11 Jac. 1. 1. 12.

It is not in common or joint tenancy, and even then this action is a joint one - & if one dies the life may be joined & the goods in order under it - for the sake of one or the sake of the other, then can be no communion. 12 Jac. 292. 1 Rep. 140, 12 Jac. 614, 1 Rep. 140.

If one of two tenants destroys the only house for the destruction must be admitted to say that he did the for the other should. 1 Jac. 240. 12 Jac. 9. 12 Jac. 114, 123.

If one joint tenant brings an action as a stranger in he may plead in abatement the nonexistence of the other tenant. 12 Jac. 292. 12 Jac. 114. 12 Jac. 114.

The act of having a thing from a freehold is not such a communion as will support this action. Thus taking a door or window, though not transfer the proper kind of action. 12 Jac. 240. 12 Jac. 114.

For the tenant taking possession from the freehold, there is no 12 Jac. 114. 12 Jac. 114.

When a person takes an estate from another

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goods destroy them from necessity & over must not
be their purpose is creation of a net & thereby goods
submitted to law in case of 1. 2. 3. 4. 5. 6. 7. 8. 9. 10.

Findings in favor.

The state must state the place of the commission or
its ill in substance according to the old & its new
consideration in more form. Exp. 1. 588. 1. no. 1. 78. 2. 3. 4. 5. 6. 7. 8. 9. 10.

The state should more than just in the gift - so it
should be more popular of his own good he suffe
and. Hand. M. & Hoore 6. 11. & Saund. 324. Str. 1073.

The uncertainty to state a demand & reference the
ordinary course do this is matter of fact & need not
be argued.

The time of the commission must primarily be stated
or there is a radical defect, not more over by a verdict
not so now. Exp. 1. 588. 1. no. 1. 78. 2. 3. 4. 5. 6. 7. 8. 9. 10.

If there is a deficiency as to time, no good after ver
dict, & I think on 4. Demurrer. Parth. 324. 1. no. 1. 78. 2. 3. 4. 5. 6. 7. 8. 9. 10.

The thing must be described so as to be known, not
particularly. Str. 1073. 1. no. 1. 78. 2. 3. 4. 5. 6. 7. 8. 9. 10.

Exp. says the uncertainty to state the value of the
goods - but this I think must be so - for the value of the
thing is the B. of damages - & there must be some
thing that is prima facie the B. of damages in the

may have no ground on which to rest them.
 B. & P. 148. Co. 148. 5. 2. 179. Exp. 74. 7. 2. 179. 430.

It is at times true that there good pleas to the action
 are to be found in law, but many others have been
 used - some plea in justification in law, but
 would be a y. if not. B. & P. 148. H. 1078. Jalk. 654.
 Co. 148.

The best of a justification must always be plead
 - tho in law it must be given in and under the y.
 if not. B. & P. 148. Exp. 74.

Any thing that does amount to the limit of the
 commission, may be pleaded, if it does a
 amount to the y. if not.

In law, the act of simulation does not run as law.

This prosecution was in any case well supported & the prosecution either knowing it in a past, or not knowing any more, or not to support it.

In this case the old arguments in relation to the same.

It will be proper to distinguish between the cases where the original or former prosecution was good, & where a criminal suit.

1st When there is a criminal.

generally where one is guilty & maliciously injured for a crime that endangers one's safety or ^{life} property, or ruins his reputation or his property this action will lie. See B. & C. 46. Hale 377. Hk. 777. Exp. C. 224.

For no excuse that the indictment or the writ was defective, or insufficient in it, so that the writ could not have supported it. The expense upon it is sufficient to maintain. See B. & C. 46. Hk. 777. & C. 46. 137.

Also if the ground upon which the writ or indictment is insufficient this action will lie, & for the same reason as in the last case. See B. & C. 46.

Id. H. & C. says the writ must have been injured in his reputation as much as in his property to maintain this action - but I think expense alone will support it. See B. & C. 46. Hk. 777. Exp. C. 224.

Public officers concerning prosecution or officers on false information are not liable in this action. And the person giving such information in such case, if he knows it to be false, or has no reasonable ground to believe it is true, is liable in this action. See B. & C. 46. Hk. 777. Exp. C. 224. B. & C. 46. Hk. 777. Exp. C. 224.

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But if a public officer of his own motion without information maliciously & without probable cause, commences a prosecution he is liable in this action. 6 R.R. 2. 1. 221. 24.

The circumstances may be such as to require the action to be brought for false imprisonment - consequently the issue in T. R. must overrule the case in R. R. this but only says the form of action should have been to prevent.

In this action it must always appear that the former prosecution has ended. In action of conspiracy it is not only necessary that the former action be ended but also that the p^lff be acquitted in the technical sense of the word.

But in this action, the issue must be a termination of the former prosecution, there need not be a technical acquittal - i.e. a finding in the neg. 10 Mod. 299. Eng. 2. 1. 267. 11 R. 2. 1. 231.

The onus is to show that the former prosecution has ended, is aided by verdict. 1 Linn. 223. Exp. D. 199.

If the p^lff alleges that the former prosecution terminated in one manner, & it terminated in another, this is a fatal ~~error~~ variance - thus if he should state that it ended by acquittal & a nolle prosequi was entered it is fatal. 1 Linn. 223. Exp. D. 199. 10 Mod. 261.

The death in this action states all the sides in the former prosecution & a minimal or any material part or point is fatal - if it is not material it is not fatal. 1 Linn. 223. Exp. D. 199.

An acquittal does not in itself do the original presumption comes within the rule & is no presumption out of a want of probable cause. 1 A 257 Dist Ct.

The acquittal of the deft in the former action is not always prima facie evd of a want of probable cause tho' so generally. 3 A 114 Dist Ct.

The finding of the bill of indictment by the grand jury, or the winding over by a ct of inquiry, is no conclusive evd of the existence of probable cause. It shifts the onus probandi from the deft to the p[ro]sec.

If the facts in action the knowledge of the deft be in some cases must show probable cause, the finding the indictment by the grand jury & the winding over by the ct of inquiry notwithstanding. 3 A 114 Dist Ct.

The existence of probable cause is a mixed question, as setting aside of fact & partly of l. What facts amount to a probable cause is a mixed question of l. Whether certain facts exist or not is a matter of fact - but those facts being ascertained is a question of l. whether they amount to a probable cause. 1 A 250, 252 3 A 114.

The grounds of suspicion would be specially considered if there are demands to, the ct come to decide on the question of l. 1 A 134. 2 A 533.

In contemplation of l. probable cause need have existed, unless the crime on which the prosecution was predicated was actually committed. When the crime was committed probable cause may have existed -

but if bona not amittitur proinde non censetur
non voluit. 8 Rep. 233. 7. Hec. 25. 2. Hec. 25. 2. Hec. 25. 2.

Whether the prosecution was continuous or not is a
mixed question - but what amounts to evidence is a
question of fact - and is what is to be decided by the
jury. The facts are as stated. 21 May 1533 1 Hen. 233.
1. 1. 2. 17.

To a J. of Justice in Bug then to show the action is
for a malicious prosecution you follow the pth and
show a copy of the original record, granted by the J.
- & the granting a copy is discretionary with the J.
- the intent of the J. is to prevent the pth from pro-
secuting the matter. But where the record is a
mere simultaneous mere copy is insufficient - an over-
copy is sufficient to prove the former proceed-
ing is one original in the clerk of the J. The reason
of this distinction I don't remember precisely. 1. 2. 2. 38.
1. 2. 2. 38.

Malicious Prosecution in Civil Suits.

To a J. of Justice to show that an action don't lie for ma-
licious prosecution, when the original suit was a civil
one, the J. is bound to - because he is not the J. the suit is a
claim of right, & the pth is liable to be removed. &
it lies for costs.

This J. is incorrectly expressed - for not true any more
of civil than of criminal prosecutions. The meaning
of the J. seems to be this - when the former civil
suit was quashed the J. promises no damages
because the pth was amenable pro facto clamore.

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§ for the costs of the appt. & he is not liable unless special damages are proved. Salk. 13. 14. for the old &.

B. & P. 11. top. 920. 1. 13. 5. 1. 600.

Exceptions to the old & 1st If there was a good cause of action in favour of one person, yet if another brings the action, having no right he is liable to an action for malicious prosecution because the old & can't appt. damages. Salk. 13. 14. top. 926.

2nd When the plff is an original unit having good cause of action, but in a court or county not having jurisdiction of the action, malicious prosecution lies because the plff could not be removed or cost taxed for the appt. & to 14.

the plff however should have known that the ct have no jurisdiction Salk. 13. 14. 1. 14. 322.

3rd If a person having no right of action & knowing he has none, sues another for the purpose of punishing him or to obtain the action provided the appt has awarded special damages, & states & proves them the plff will not in this case imply damages & Wells 309. 2. 3. 1. 129. 1. 40. 488. 3. East. 315.

there is no case of this kind in the old books

4th If for the purpose of punishing one man having a good cause of action is another to a certain amount sue him to a much greater & then holds him to execution because this action is - but it must appear on the facts, that the appt was held to execution bail Salk. 13. 1. Saunders 228. 1. vol. 725.

These are the 4. exceptions to old & 1st

The specific difference between the foundation for this action on a criminal prosecution & a civil one is that in the former, the d. prunes damages in the latter it does not. B. & P. 12. Exp. 527. Host. 208. 210.

It is to be noted that when this action is founded on a former civil suit the very quantum must be stated the special damage whatever it is must be stated in the declaration. Wills. 905. Salt. 13. 1. Sid. 424. 2d Ray. 980. 984.

When this action is founded on a former criminal prosecution, stating the damages generally is sufficient.

But to this B. there is one exception; if a man stranger sues A to commence a groundless suit or a groundless indictment is sufficient, the name as if issued on a former criminal prosecution, the stranger proceeds in this case the suit to be brought - he does not bring it in his own name - he cannot be answered or taxed with costs - nor is he liable for the damages as the nominal plaintiff is pro falso clamore. Id. Ray. 980. Salt. 13.

I have said that when the former suit was a public prosecution, it must be determined before this is brought. But when this action is brought for a former civil suit it is necessary that actual damages should have been suffered or that it should be immaterial & it is also necessary that the former civil suit, should have been determined in order to maintain this. Str. 114. B. & P. 13.

As to necessity that the former civil suit be determined for not necessary that it be the person of the plaintiff for if he was wronged by a sufficient to support this action. 3d B. 12. Exp. 527. 1st. Ban. 422.

By the 1st this is not a public wrong, as it is not
done it is.

In this action two persons can join any more than
in an action of slander the wrong done is one no
one is his own private wrong there is no community
of interest no joint or common right violated each
may sustain an action separately but not both joint
ly. Kebley 138.

There may be 2. dills in this case it may be an
action on the case, in the nature of a conspiracy, or an
action of conspiracy, or an action of malicious pro-
secution - this is strictly a tort in which two persons
may be joined, but there can be two dills in an ac-
tion of slander. Str. 90. 74. R. of L. 10.

In an action in two joint names, can the damages be
tried? Thus in two joint dills can the verdict be
advised in £ 800 or £ 100 - I think they can - The
damages must be found as both jointly, not separately
as in an action of trespass - false imprisonment, slander
& all similar cases.

When the parties have made separate pleas, judgment
may be given in each one severally - but the jury can
return but one. i. e. he has his election -
why then should they when the parties join in the
plea & they can't. Str. 77. 110.

Assault & Battery.

an assault is an attempt^{to} do corporal hurt to another without actually touching him - this is an immediate violence too high & not complicated - & for this injury, an action may be maintained - actual violence is something more. 1. Ba. 184. C. 11. L. 11. 1. Hawk. 133. 3. 136 & 126.

A blow which would otherwise amount to an assault may be so expressed as to fail as such - thus one says hold up my sword & say I it were not asire were I would beat you - this is not an assault - it follows then that the intention must cooperate with the act to constitute an assault - but in a battery the intention need not. 1. Ba. 184. C. 11. L. 11. 1. Hawk. 133. 3. 136 & 126.

Threatening words consequently can't amount to an assault - formerly they otherwise. 1. Ba. 184. C. 11. L. 11. 1. Hawk. 133. 3.

Battery consists in an actual violence on the person of another - & is generally agreed that the least injury of violence committed in an angry violent mode, or violent manner to a battery - it signifies in another place or pinching his nose or touching on his toe are all of them under the government of the circumstances a battery.

When the injury done is merely nominal, as when it is done in an angry violent mode & without manner - but if an actual injury is done, as when it is done in an angry violent manner - accident does it, makes one liable. 1. Ba. 184. C. 11. L. 11. 1. Hawk. 133. 3.

Bl. has evidently given an incorrect definition of the word "battery" - he says he can understand beating & an other - now he says that battery is sometimes justifiable - thus if parent strikes his child, no amount of battery - yet is justifiable - an unlawful act is not justifiable - consequently Bl's definition is incorrect.

A battery is an actual violence committed on the person of another, & is not always unlawful. 3 Bl. 120. 2 Roll. 527

Every battery includes an assault - every communicated violence includes inchoate violence - consequently every proof of battery will support an action of ass't & battery. 120. 134. 144.

Threatening words are sometimes actionable & sometimes not - when they occasion actual inconvenience, they are actionable - the ^{of action} Bl. says is trespass vi et armis.

Thus if A threatens B in such a manner that he is incapable of attending to business, an action will lie - but I should say an action on the case per quod is the proper one - for the

remedy of this is namely the interruption of one's business is a mere omission & the damages are consequential. Threatening words & menaces are not per se an injury - & there is no act on which the action of trespass vi et armis can be predicated which is not per se an injury. 3 Bl. 120. 2 Roll. 545.

The injury which will support a battery must be direct & contraventioned from indirect

If the injury is produced by a constant train of physi-

al effect arising out of a pious from the original act of the 1stst he is considered as the author of the whole & this action lies. see the next case Robt. R. 392. 11th 694.
9. Wils. 309.

If A pushes B as to & thus injures C it is liable for B is in this case a mere instrument. 11th 694.
3. Ch. 116.

If a horse is suddenly frightened & runs as a person & injures, the rider is not liable.

If however the rider, knowing his horse to be unruly should ride into a field, where was a large number of people, & one is injured, he may have trespass on the case - for the violence was by the commission of the 1stst. - lies in no way his own.

If another person should strike the horse, & he should run as a man & injure some, the striker & not the rider would be liable - the action in this case would be trespass for 1st & battery. B. N. P. 16.

As in the former case if the rider rides his horse into the field, for the purpose of injuring some one he is liable in 1st & battery. 11th 694. 1. Mod. 25. 4. 70.
405. 505. B. N. P. 16.

When a man receives a bodily hurt he may in some instances maintain this action & in some he can't. The 1st is when the act is lawful he can't maintain this action - but he can when the act is unlawful, it lies. 1. 914.
1. Ba. 4. 394.

This is exceptionable -

If two persons consent to play at cudgel

One is injured this action would lie - for this is common
 ground & increases strength & promotes digestion - and his
 ad if true person consent to fight & one is must this
 action lie - for his unwilling to use,

This is not. I take this to be the case - where two per-
 sons consent to do a lawful or unlawful act & one is in-
 jured, he can't for his injury maintain an action - he
 is particeps criminis.

This consent considered as consent is merely void.

I take this to be the distinction - consent is no excuse when
 the public sees for its remedy.

If a man consents to let one whip him so fast as with
 a raw hide he can't maintain a civil action for the injury
 - tho if he is a mark of police the public has its remedy.
comb. 212. 3. Ch. 17.

It is clearly a good excuse that the injury happened in an
 amicable contest, as something at comb. 2. 17.

If A attacks B & B in defending himself throws his fist
 back & strikes & accidentally injures him this action lies.
2. 30. 17. 826. T. R. 468.

For maintaining this action, a malicious intent is clearly
 unnecessary - the above examples corroborates this.

Exp says that to make this action maintainable the injury
 must be voluntarily or occasioned by a due
want of care.

This definition is exceptionable - for idiots & infants are liable
 in this action - & in view of the a. they are non machines &

But that the injury was involuntary, unless it was inevitable - in this case I suppose the dog to be a agent - consequently the dog case in Bur is not analogous to this, for there the owner was not the direct or immediate agent. Bur 2096.

There is no doubt but that, if the injury was inevitable the dog is excused.

There is another distinction - Where the act causing the injury is unlawful, the author of it is always liable in some sort of action. This is an observation that applies to all actions sounding in tort.

The lawfulness or unlawfulness does determine the kind of action - it may be an action of trespass on the case & be immaterial as to his liability, whether the damage be immediate or consequential consequential or not. So if A throws a dog into the street & B's horse breaks his leg over it, A is liable in case - but had he thrown it in B's house & broke his leg, trespass would be the proper action.

If A discharges a gun into a field where there are a number of persons & injures one, trespass is the action.

But as a q. & that when one does a lawful act & a injury arises from it accidentally, he is not liable. 2 Bro. P. C. 393, 1 Vent. 296. Ed. Ray. 1574. 480. 12 Mod. 649.

So then, if tortious accident applies equally to all kinds of trespass - as well as to this particular case.

There are three - 1st Denial of the charge - 2nd Some excuse which saves the act - 3rd Justification.

1st Denial is made by s^{aying} the *q. ipse* & matter of excuse may be ^{pleaded} under the *q. ipse* or pleaded specially. The *q. ipse* in this action is "not guilty." B. C. 17.

A battery is in many cases justifiable - Justification is different from an excuse - to justify is to maintain the act done but excuse allows the unlawfulness of the act & says at the same time something that will excuse it. If an officer having a legal process to arrest a person, is opposed in the arrest, he may use any degree of violence to complete the arrest, that is absolutely necessary, or to prevent the person from escaping. 1 Hawk. 130. 1. Ba. A. 181.

But in the case of the officer, violence can't be justified unless there is an attempt to escape or actual resistance. Str. 1049. 2. Lev 509. Cro. E. 99. B. C. 18. 19.

A mere right to arrest will justify an *apt* but not a battery. 2d. Ray 222.

If one is sued in *apt* & battery he may justify as to the whole by an *imposuit manus molitur* - i. e. where there is nothing more than a nominal beating he may justify by this plea of *imposuit* &c. But he must justify the violence complained of as a battery, if there is violence & an attempt to escape. Str. 149. 2. Roll. 946. 1. Ba. 159. B. N. 19.

The plea of *molitur* &c. may be made to a charge of *apt* & battery - the justification goes as well to the *apt* as to the battery, but not to the wounding of a person.

such plea is bad in case of an allegation of wounding or mayhem. Skir. 987. Bro. & 99. 9. L. v. 404. 2. D. 915. 2. Kent. 199.

The L. gives no definition of wounding - it doubtless means something more than a battery - I should say it meant a contusion or laceration - some visible hurt.

A Battery is justifiable on the ground of self defence - thus if one man strikes me first, I may strike him in return - & if he sues me, I may justify by a plea of "non assault domine" - & an aft by the pttf will justify a battery by the dftt. B. & P. 17. 12. 1. Com. D. 549.

But there must always be some proportion between the aft by the pttf, & the battery by the dftt - the degree of the battery must be proportioned to the aft or battery which provoked it - tho the L. does require this proportion to be exact. B. & P. 18. 11. Mod. 49. Salk. 52. 1. did. 246.

In this case the plea is "non aft domine", & the amount of it is this that at such a time & place mentioned in the declt, the pttf then & there with force & arms assaulted the dftt & would have beaten him &c. & that the dftt in his own defense, assaulted & beat the pttf. Salk. 642. B. & P. D. 915. Readens aft. 447.

But in strictness of L. a mayhem by the dftt is not justifiable by the pttf aggression, unless twice such a would have endangered the members or life of the dftt - but if twice such he may justify a mayhem. Ed. Ross. 177. 11. Mod. 49. Salk. 642. B. & P. D. 311.

The proper replication to the plea of "non aft domine" is by way of traverse, de injuria
S. 60. 66. 1. Res. & P. 76.

And in some cases the dft is justified in a battery when the plt is the blameable cause of it, tho the plt did not strike nor attempt to strike him. So where the plt tilted a bench & threw off the dft - & the dft hit off the plt's nose - the dft was not held liable. But this case is reported differently with regard to the circumstances. Ed. Ray. 177. Salk. 652. 11 Mod. 59.

Again the plt & dft were gambling, & the plt put his money into the dft's heap, which was the largest & demanded half - the dft had a scuffle with him & was guilty of battery but was held not liable. 60. 4966.

In many cases battery is justifiable on account of the relation of the parties - as in case of Parent & child, schoolmaster & scholar, master & his W. & according to B. H. & W. in the case the chastisement must be moderate. 1. Sid. 176. 1. Hawk. 130. 3. A. P. 14.

These relations except H & W constitute special justification - & according to the L. & C. 109 the H has a right reasonably to correct his W. & it has been so decided by Justice Byles.

So also a man may justify a battery in defence of his H. & a W. in defence of her H. - so too in parent & child - & in such cases the L. places the person interfering, in the same situation as one of the parties - hence the H may use the same violence that it might have used. Ed. Ray. 62. 3. A. P. 14.

It is settled also that a S may justify a battery in defence of his M. - Whether a M. may, in defence of his S. is not well settled - tho I take the better opinion to be that he may. see M. & S. 9. Ba. 968. Ed. Ray. 62. 3. A. P. 14.

Ed. 407.1 to 422.1 Hale 587.

But the one may justify a battery in defense of his W. & the plea must show that he did it in his defense & to prevent her from doing violence - the L. must not in such case allow a vindictive battery. Ed. 407.1 to 422.1.

A man may justify a battery in defense of his person when forcibly invaded - this A. contemplates actual force, not nominal injury - actual force consists in breaking a door or window &c. but if one man peacefully enters on the land of another the owner can't justify a battery on him, till he has requested him peaceably to depart - then he may - Hale 130. Ed. 421. 3. 4. 2. 12.

According to a great number of authorities when the act complained of is an entry on land, & the owner commits a battery to drive off the intruder, he must in his plea state it to be a voluntarily & not an actual battery.

There seems to be no reason in this L. & Ed. law why since it & all the authorities, tho' thus having been published it & it of always practised on. Ed. 407. 62. Ed. 407. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

The next I contemplate the owner of property in person & recalls to his right of defending his person - When he is seized or apprehended a wrong is done & obtained - tho' as to real property not known at L. & Ed. L. to one who had a right to person or entry on land, was allowed to regain person by force from the detainer or dispossession. 2. 2a. 205 & 206. 178. 4. 20 158.

Private Wrongs

159

By several English, state the law of which is: that
If one may not enter on lands &c. of which another
is in possession in a peaceable manner et infra
Stats. Com 268.

These state contemplate a paper which is in some way
or in some degree abandoned - as in case of a lease
where paper is given to the paper - & in case of ransom
the paper of which is neglected by the owner & va-
cant. Minutely taking a journey in itinere is
is not such an abandonment as to preclude the
owner's right to use force

In case of great theft the lawful owner was not
permitted at C. S. to recover paper by force - as to
great theft the C. S. was unanimously decided. 9. R. 4. 5.
2. R. 2. 5. 5. 6.

Provocation never justifies a battery and may invite
suit damages -

The right of taking goods from a felon belongs to
any body as much as to the owner founded on the
right to apprehend felons.

The owner can take it on any other grounds or
for any other purpose than securing the felon for
punishment, & the party for the time owner he may
use it himself - but this point, is the like vests in
another by the decision of the Ct. 1. Will. 6. Exp. 307.

A S. can't justify a battery in defense of his M. goods
unless he is transporting them when his paper is
good in all but the owner & he may defend it. Bro.
8. 242. 5. Com. 2. 384.

If one commits a battery on another at different times, they can't be tried in one count with a continuance nor to have been done on divers days & at divers times. Comp. 327. Stark. 630 1. 4. 30 212. Esp. 116.

When a battery is committed on a married woman the H. & W. must be joined in the action, & the damages stated, as *ad damnum ipsorum* Id. 387. 1. Ross 382. Id. Ray. 1202. Esp. 316.

If in such case two persons join as H. & W. who are not really so, advantage must be taken of it by plea in abatement. Id. 480. Esp. 321.

If the battery has been committed on the H. & W. he alone must sue for that on himself, & for that on her they must join - but if they both join in both batteries, & judge the damages are entire, judge is erroneous - but if the damages are apportioned, judge is erroneous & may be reversed so far as to the H's battery ~~not~~ & not as to the W's. Id. 916. 1. Ross 182. Bro. J. 680.

A H. may say in his declaration may facts for which he could not recover in themselves for the purpose of aggravating damages - so entering the house, mistreating the H. & children may be tried in the declaration - they are considered merely as the circumstances of the battery - they may in proof be if not stated in the declaration. Stark. 642.

When a defendant moves on a justification he must plead it specially - he can't prove it under the g. issue tho' he may in some. Co. Litt. 212 Esp. 317.

If the defendant pleads the g. issue when he has matter of justification, he may join it in and under the g.

issue in mitigation of damages.

It also must be shown at the time of the transaction may be given in evidence to mitigate damages, tho' the amount to the y. issue a mitigation. Exp. 8. 117.

If the debt justifies an apt & baluy he must confess it - otherwise he lies in ill - for a man can't justify an act he never did. Salk. 37.

The most usual plea of justifying an apt & baluy is non apt demere. 1. Ba. 143. & com. 354.

There is a material R to be observed in the post apt proceeds non apt &c. - & the p'ty can justify the post apt he must plead it or abridge it specially in his replication, & give it in evidence under his traverse - & this is the R in Bon. Exp. 8. 317.

Matter of excuse may be either given in evidence under the y. issue or specially pleaded. specially if it goes to the action - if in mitigation of damages it is to be given in evidence. R. A. 1. 12. Salk. 697. 4. Mod. 404.

For the plea of molitor & the p'ty may either say "de don louc demere", or an enormous baluy, "aliqua hoc molitor minus in potest". The former denies the justification, & admits the gentle laying on of hands. The latter denies the gentle laying on of the hands, & admits the matter of justification to be true. Samuel. 381. Bon. di. tel. plea.

In this, as well as in the other actions of trespass, the p'ty is not bound to say the true day of the baluy, & of course is not bound to confine his evidence to the day laid in the debt.

In both the stat of limitation bars this action in 9 years - In Eng. the stat must be pleaded specially,

As the plff must not say the true day off the month nor confine his evd to the day mentioned in the dectn, the dfts special plea must cover the whole time mentioned by the evd & dectn. For if it extends to one day only tis not sufficiently broad - tis bad on demurrer - so having justified one day he must traverse the rest of the time. The better way however is to plead not guilty as to all other days but one & then plead a special justification as to that one. 5. Ba. 208. 6. 7. Holt. 103. 2. Saund. 295. B. & M. 4. Bac. 79. 1. Inst. 289. Ld. Ray. 229.

To this last R there is one exception viz - when the defense is "Non apt &c" if the dft can prove that the plff did assault him at any ^{one} time tis a sufficient answer, & if the plff can shew another trespass he must do it by way of novel assigment. 3. H. 8. 12. (Reax. apt 457.)

So also the dfts plea should be coextensive with the dectn, as to the subject matter - i. e. it should answer the whole gravamen.

So also if the plff complains of apt & battery and wounding the dfts plea should answer the whole - for if he should plead a justification to the apt only, tis bad not only as to the battery & wounding but also as to the apt - for if tis bad in part, tis bad in whole. 6. H. 8. 268. Exp. 6. 318.

A plea of moliter manus innoxius to a charge of wounding is bad.

A plea of non apt dmesne reaches the whole gravamen - it covers, the apt & battery & mauling.

A plea of justification standing in the relation of parent & child. He should state it to have been done by way of preventing an injury, & not of revenge.
Str. 113. Ed. Ray. 62. Bro. J. 2. Roll. 946. Exp. 7. 918.

A former recovery of damages by the plff for the same injury, whether vs the dftt or any other person is a good bar to the action - this is the R. in all cases of trespass. Bro. E. 90. Bro. J. 79. 5. Ba. 130. Salk. 11. B. & P. 220.

The R. is different in courts - for a recovery of judgment vs one of two obligors, will not bar an action vs another.

And this R. holds even when new damages accrue after the ^{first} recovery - Salk. 11. Off. 319. Bro. E. 90. Bro. J. 79. B. & P. 220.

So also in trespass generally, a former recovery is a bar to all trespasses with a continuance committed before the date of the writ. 2. Root 920.

If this injury is committed by several, the plff may sue any or all of them. 5. L. R. 681.

Here too a release to one is a release to all. Exp. 8. 415. Holt. 56.

When a jury, there being several dftts may sever damages is, not settled on or disputed in the books - If two or more persons are charged jointly in an action of apt & battery, & found jointly guilty the jury can sever

damages - i. e. this is pretty clear if the dfts. are in one plea - & I think the jury can't sever if they plead severally. Cro. J. 118. Jenkins. 317. Cro. 321. 320. 11. Co. 8. Earth. 19. Bur. 2770.

If judge goes on one by default the jury can't sever. Cro. 420. Str. 426.

But in one case only it has been decided, that if the dfts. were in their pleas the jury may sever in damages. Str. 1140. Cro. 8420.

But in this decision there are many authorities, 1. Co. 67. B. N. P. 27. Cro. J. 118. 984. Earth. 19. Cro. 8460. 9. Co. 79. Bur. 2780. Str. 910. Jenkins. 317.

But in cases where the jury have no right to sever damages the plff. may prevent error, in committing one affidavit & taking judgment for another - if he takes for both tis erroneous - & he has his election to take judgment as to one, or to enter a nolle prosequere as to the other - this too may prevent error. Earth. 20. 11. Co. 79. B. N. P. 20.

But in a case of this kind the plff. may always require that the damages be consolidated. Cro. 6. 179. Earth. 19. Holt. 70.

And in case of the jury may find one of the dfts. guilty as to part, & another as to the other part - & then sever the damages - for the dfts. are not found jointly guilty - this is doubtful I think & the case in Coke is so it - for the R. there is that the jury can't sever the damages, unless they are found guilty at several times - our Ct. has adopted this R. B. N. P. 20. 1. Co. 8. 6. 7. Cro. 84. Cro. 8420. contra.

I have said to the jury that it made no difference whether the expenses joined in their plea or not & that the jury must find entire damages - but so in our own person or it.

In such a note, however, as to remove doubts upon jury discharges the whole - & the case of a non-suit is the same - it is not so in our practice. Host. 70. 180, Barth 19, B. & P. 220, Bro. § 179.

When a plaintiff has brought this or any other action in several, the court will permit him to strike out one & the action will proceed as the others - but the defendant must be willing to have this done as the plaintiff cannot compel him to it.

It sometimes happens that the plaintiff will arbitrarily make a stranger to the transaction, a defendant, to prevent the other defendants from having his testimony - here the court will permit him to testify for the other defendants - but he must be tried first & if there is any testimony in his favor, if it is very slight, the court will direct the jury to find a verdict for him & then he may testify. 2. Ba. 287. 1. Sid. 551. B. & P. 288.

All causes of action arising ex delicto are several. i. e. each party concerned in the wrong may be sued by himself - tho they may be joined. 3 A. R. 651.

In this action the jury may very often find the defendant guilty as to a part of what is complained of, & not guilty as to a part - but there is no need of this - for if any part of the grievance is proved, they may find him guilty generally, & apportion the damages accordingly.

A finding by the jury of more than is put in issue is ill - thus if fault is traversed & fault is determined to the can find only on the fault traversed. if they do, the verdict may be set aside.

When there has been a mayhem the ct upon view of it may increase the damages given by the jury at their discretion - & this, tho mayhem is not expressly charged in the death - provided that the judge certifies that the deft has committed mayhem.

Damages can't be increased at nisi prius.

The jury must be present at the trial that the mayhem is inspected.

This is founded on the R. that by the G. L. on an appeal of mayhem, the question whether mayhem or not was decided by inspection. Ed. Ray 176. 1. Will. 1. Batch. 229. 1. Sid. 108 9. Bl. 999.

The judges can never increase the damages in case of mayhem, unless tis proved that the must inspected is the same as the one found by the jury & charged in the death, B. & P. 21.

In analogy to this R tis settled in Eng. that damages may be increased in case of wounding or atrocious battery, Ed. Ray 176. 9. B. 399.

The established R. not to increase the damages, if the judge before whom the case is tried, declares his opinion that the damages found by the jury are sufficient 3. B. 110.

The intention is to leave for the jury to give more dam

Private Wrongs

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ages there are demanded in the death - indeed it
may be paid - for if justice is rendered the whole
verdict is bad - to avoid this the p^{ty} must receive
all over the sum paid. Bro. J 277. Benth. 21 Ex. 520. 11 Co. 115.
1 H. Bl. 59. 4. B. 28. 26.

I don't see the necessity of the p^{ty} remitting - I should
think that it might think this as mere surplusage.

Every aft & battery is a public offence, & may be pun-
ished, by fine & imprisonment. 1 Hawk. 135. 4. Bl. 138. 216.

It was formerly a question whether an action for an
aft could be maintained when two or more
committed it - it is decided that it may. Kirby 108.

False Imprisonment.

This is every unlawful restraint of ones liberty - or violation of ones right of locomotion. His immaterial name a man is confined - it may be in the street, in a prison, in a private house &c. Black. 2d. 3. 11. 127.

To constitute false imprisonment two principal ingredients are necessary 1st actual detention 2nd this detention must be unlawful. Id. Supra.

The unlawfulness of the detention must always consist in the want of duty i. e. lawful authority to imprison.

Lawful duty may arise from legal process, or the circumstances of the case, which will amount to a special justification.

There may be lawful duty without any legal process - thus any person may, may to duty to arrest a felon. 3. Bl. 127. Salt. 508.

This action won't lie in a ships crew captured as a prize, tho she should prove not to be a prize - for this injury is reached by the L of nations & it of admiralty in damages, sometimes to a very great amount. Doug. 574.

Every arrest of a person in a civil suit without any authority, amounts to false imprisonment. 1. Ba. 169. 2. Inst. 11.

A private person is not liable in this action, when he is commanded by an officer having proper jurisdiction - for the private person is bound to obey where he is commanded, A n officer must not

leave his prisoner, & go on other business. 2 Roll. A. 561.
1 Bos. & P. 24.

An officer having a man in lawful arrest on official process, can't delegate his power to a third person, i. e. a private individual. 1 Bos. & P. 24.

It may be seen under same process - tho I know of no decision.

The most usual cases of false imprisonment are where there has been an arrest under void process.

Some distinctions must be observed. It seems that if a ct of record by a judicial act, from any motive, imprisons a person, they having jurisdiction of the subject matter, they are not liable to this action. 1 T. R. 509. Comp. 172. Salt. 396 2 B. R. 1141.

A judge of a ct of record having general jurisdiction of is not liable for any judicial act, whether it happens thro mistake or malice, if he confines himself to his proper jurisdiction. 2 B. R. 1141. Esp. 326. 12 Co. 23. 4 Salt. 496. Comp. 172. Ed Ray. 507. 1 T. R. 509. 534. 5. 6. 7. 8. 13. 14.

The reason of this rule is that no proof can be admitted to rebut the violent presumption in favour of a judges integrity. 10 Co. 70. 2 B. R. 1145. Salt. 396.

But if a court of record of over general jurisdiction, goes beyond its limits as to subject matter, and acts maliciously the judges are here liable - even if they do so thro mistake.

If judges of limited jurisdiction, transgress their bound, even thro mistake, tho they are liable - even if within their jurisdiction they act maliciously. 2 B. R. 1145. Ed Ray 494. Salt. 396.

Str. 999. Exp. 931. 326. 860. 114. 1 J. R. 869.

The preceding rules are made less severe by several
stat. Term R. 536. Exp. 998. 9. Rev. 599. Str. 710. 1 Bl. 313.

It having power to punish by fine & imprisonment
are considered acts of record. Ed. Ray 467. Salk 200. Benth 99.
3 Bl. 25. 12 Mod 386.

Boutrea 2 Bl. R. 1146.

Enter & action cannot be converted for duties of testator or in-
testate - they may for a deviantant. Exp. 926. 9 Wils 368.

In this case false imprisonment lies vs the atty as original
party - & the rule is general, that attys, instrumental in car-
rying a suit, are liable with their principals. 1 Wils 945. 977.
2 Bl. R. 1192.

In this case I presume the officer would not be liable. 10. Co
76. 2 Wils 388. Exp. 991. 1 Lev. 95. Str. 710.

Suitors at it are exempted from arrests - the privilege ex-
tends to his house money & necessaries - arrest in this case
at first is not illegal - but a supersedeas issues, & then this
action will lie - tis the cl. privilege, not the party's. 4 Com
575. 4 Ba 222. 2 Roll 279. 1 H. Bl. 636. 5 Ba. 191. Bro 6. 979. Comp 979.
Exp. 927. 2 Bl. R. 1190. 1 Wils 220. 4 Ba. 664. c.

This privilege is disallowed in case of collusion, as in vexa-
tious actions - tis discretionary with the cl. to allow it or not.
2 Bl. R. 1199. Comp. 9. 1 H. Bl. 636. 11 Mod 79. Salk 544.

If a Sh or jailor detains one for fees tis not false imprison-
ment - nor if for his board. 5 Ba. 170. 1 Inst. 89. 1 Root 154.

If a cl. orders confinement in one place, & the person is con-

joined in another, his false imprisonment - Str 404. 2 Mod 295.
5 Ba 171.

A peace officer without a warrant may arrest a man on a charge of felony. Doug 935. 5 Ba 517. 1 Roll 53.

Secur with a private person, if the man arrested is innocent - though if he has good grounds of suspicion & is not malicious, it seems he is not liable. Exp 935. 2 Ba 171. Doug. 345. 1 Bul 152.

By stat. arrests on Sunday, in civil suits, is void, & the officer is liable for false imprisonment - tis secur in criminal cases. Exp 927. 6 OS. 5 M 95. Salk 78. 4 Ba 486. 1 Str 265. 13 Mod 1155.
 By C. L. arrests in civil suits thus made ^{are} good. 2 Bul 72.

Tis sd a bail may take his principal on the sabbath - but this is denied. Bl. R. 1272. Salk 626. Exp 635.

When Sh. breaks outer door & arrests a man, this action lies. Str 560 982. Cowp 1. 1 Hob 62. 2 Ba 367.

Quere. When arrests are made on Sunday, or by breaking outer door, or in some other illegal way, may the man arrested be discharged on motion. 2 Ba 467. 2 Smith 280. 6.
That he could see 609. Cowp 1. 9. Exp 604. 8. Bro 8708. Kirby 988.

If an illegal arrest is made, which occasions another that otherwise be good, is it vitiated by the illegal one? decided that tis not, if there is no collusion inter the parties. Bl. R. 829.

If an officer arrests a wrong person, even if the person arrested says he is the one sought for, he is liable. Exp 928. 9 Com 492. 2 Roll 512. Moor 457. Hard 923. Luen say I.

A private person may arrest persons fighting, and keep

them till their passions subside. 5 Ba. 171.

A female covert arrested on mere process, may be discharged on motion - but the officer is not liable - tis a G. R. that an warrant for arresting a person ought to be in writing. Exp. 927. Hy. 1272. 1. L. R. 486. R. A. 726. Doug. 648. R. 119. L. R. 17. 10. 6076^b.

Tis so in one case, that confining a man, for a short time under a parol warrant of a Justice of the peace, is not false imprisonment - but tis so in another case that it must not exceed 9 days. 5 Ba. 172. Mous 409. Err & 829.

A private person may without express warrant confine a man of disordered mind who seems inclined to do mischief. 5 Ba. 172.

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Actions founded on Contr.

These consist of ass't, debt, covenant, account & detinue.

II Ass't. Promises which lay a foundation for an action are of 2 kinds viz. express & implied.

1st An express

promise is 1, where the terms of the contr. vained by it are agreed upon thro' out - or as Bl says, where the terms of the agreement are openly uttered & avowed at the time of making it. L. Bl. 547.

This promise may be by parol or in writing. & the form of action is the same in both cases - even if he required by the stat of 1 & 2. to be in writing, you need not declare on it as such, tho' you clearly may do it - you may give it in evd under the 4. issue.

Implied promises arise in many ways - Bl defines them to be such as reason & justice dictate, & which the L. therefore presumes that every man undertakes to perform. L. Bl. 547.

Or as he otherwise expressed, when the terms of the contr. have not been carried into execution, & the subject matter is such that a contr. may be made out of it, this is not an express but an implied promise.

The implied promise which reaches a vast variety of cases, & ^{may} lay the foundation for an action, when all ideas of a contr. in point of fact are exploded, as in the case of money paid, or where a man turns his th. out of doors. This L. is not founded on ass't or contr., but on the principle, that he has duty, as the L. says he ought to do.

These promises lay the foundation for an action of ass't which is of 2 kinds, viz. express & implied.

In bringing of this action, I shall consider under the two kinds express & implied apt are concurrent & when one only can be brought.

Whenever there is an express cont to pay a certain sum they are concurrent. Indebtedness always creates a cont because it creates a duty - consequently an action on either will lie. & tis the best way to lay both in one death - for when you sue on the express alone, if the defendant don't remember you paid. But if on the implied alone altho. you may give in evd the express to support it, yet you are not bound to do it, but may prove by other testimony the fact of indebtedness to the same amount & recover accordingly.

In this case debt may also be brought. Debt is a sum of money due by cont & agreement, the sum being fixed & depends on no subsequent valuation to settle it. 3 Bl. 184. 4. 60. H.

This action is generally discontinued as the debt was permitted to wage us. To prevent this the action of apt is sought, & the allegation "that he fraudulently & corruptly ~~to~~ intended &c." is inserted for no man can swear himself clear of fraud.

If a promise is made to do a collateral act & tis not done the remedy is in damages.

When there is a warranty & fraud is practiced at the same time, an action on warranty for fraud will lie.

- ~~Indt~~ apt is concurrent with debt on a quantum valdebat - & an express apt would lie ~~here~~ because the express terms of the cont are not agreed upon. Thus money loaned where is no express cont.

Implied apt is sometimes concurrent with trespass & trover. As where A goes into B's field taking his horse (not stealing it) & sells it - here trespass lies for the entry & trover for the conversion - & imple apt for money had & received.

Where money is taken by violence, trespass in id amur & apt. If money be taken by fraud an action for the fraud, & apt.

There are some few cases in which implied apt alone will lie. Where the consideration happens to fail this is the only action. E.g. A sells bond to B supposing it to be his bond. A receives the money - & happens not to own it - ^{implied} apt only lies - so in the case of money paid or paid by mistake.

This action generally lies where I have the money of another & cannot in good conscience retain it.

This is l. but it requires some qualification - Where money is in the hands of A, which he ought not in good conscience to retain, apt will lie if no principle of policy steps in to prevent it. E.g. Money lent at a gaming table cannot be recovered back on this ground.

This action of imple apt is similar to a bill in equity - is extensive - & whatever may be introduced there out in chry, may be introduced here. 2. Burr 1010.

This action lies for money paid by extortion or deceit. Formerly twas necessary to go to chry. Sab. 28.

A married man courted & married another woman & took the rent & profits of his land - this action lay to recover it back. Sab. 28.

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Actions on Bond.

Lent money & lent goods, for a grant of an annuity, annually, is not good by 2. Aft. to recover the money was supported. 1. S.R. 742.

When there was a promise to lease from one man to another, & before the lease was obtained & after the money was paid, aft. lay to recover the money. S.R. 964.

This action lies to recover money paid under a void acty. B. & C. owes B. a sum of money - B. forged a power of atty in B's name, & employed D to sue & recover it - to prevent cost C pays the money to D & D to B. Now A's liability to B is not gone - he must pay him - but can he recover of D the innocent atty - from B he could - but B is not to be found - tho' it inclined to the opinion that D was liable.

When an agent recovers money for the principal & pays it over to him, the principal having the right you cant go vs the agent, but you must go vs the principal. 1. S.R. 59.

But where the acty is all void you may recover of him who acts under it. But what is a void acty? Here another scene to clash.

The principle laid down is this - "where the acty given is a complaint on the acty is not void"

1. Salk. 27. Fellow of adthor were granted, no will being found - afterwards a will was discovered - the adthor in the mean time collected money - afterwards there was a repeal of the adthor - could the money be recovered out of the adthor? held it could - yet had he paid it over it could not - because there was no necessity he is not liable farther than an adthor in his own writing.

Actions on Contract

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9. 5. 2. 128. *Gomes B. v. B.* - B forges a will & makes himself extr. - he sues A & recovers money - afterwards the will appears to have been a forged one. A dies & the attor dies - a question arises, could he recover out of B? no - for B. paid under a compulsiu act.

Indt apt will lie in any case where chng would rescind the cont. as in the case of extortion - undue advantage, apprehension &c. Doug. 681.

A note was given on a compromise by a contr. - it was a fraud & undue advantage - the money could not be recovered back as the note could never be enforced.

There was once a principle in Eng. that this action would not lie to recover money of a felon, because all his prop. is forfeited - this is now done away or evaded by an action for embezzling the prop. & it is. B. & P. 192.

If money is embezzled & paid out to a bona fide receiver, it can't be recovered back, because tis the circulating medium & it would be dangerous to allow a recovery - tis not so with any other prop. as a house.

But had the money been paid over on an illegal cont. this action would lie to recover it back. Gorup. 197.

Indt apt will lie to recover money that had been paid on a judgt. which has been reversed - no other action will lie - Attempts have been made to subject the party in trespass, as guilty of a wrong - but they have been fruitless. Trespass will not lie for money recovered on a judgt. reversed by a

it having competent jurisdiction. 2 A. P. 191. Comp. 419.

Another afft lies to recover money paid on a judgment of a court of competent jurisdiction on the ground that the judgment ought not to keep the money in justice, for a reason that the plaintiff could not avail himself of when judgment was rendered. Bur. 11405.

When the judgment of one court goes to implicate the judgment of another in a collateral way, it is erroneous. But where the judgment is not attacked collaterally, & the money is unjustly detained judgment makes no difference - it may be recovered in assumpsit. Str. 406, 1 H. B. 502.

A judgment cannot be attacked needlessly - If in this case the party could have proved his covenant & the court could have taken cognizance of it, they would not have supported assumpsit, but would have held him to his action on the covenant - Whenever express assumpsit is brought, it is brought, for the mere fulfillment of the contract.

When an action is brought on the implied promise, it is on the ground of no action at all. it waives the contract entirely.

An action of assumpsit lies to recover back money paid on an illegal contract, when the law does place both parties in habe delicto. E.g. money paid to a lottery insurer may be recovered. 2 B. R. 1079. 1 H. B. 65. Comp. 790.

So where both parties are in habe delicto & the law was made to punish the one & not the other. The former may recover back the money paid in consequence of such unlawful agreement.

Actions on Bonds.

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Doug. Bromley vs Smith - aft lies to recover penalties to bye L. 1, corporation L. 1. D. & P. 129, bond 92.

This action also lies to recover fees of office & also mony on an award. A & B. agree to submit a controversy, & the award is, that A pay B £20. - now debt will lie as well as in the aft - & if an express agreement is made to abide the award, express ab: will lie.

The agreement to submit to an award makes up the foundation of a promise.

Suppose instead of a mere agreement to abide the award it had been a covenant - can you then sue on aft? To sd by some you must sue on covenant for tis a higher remedy & takes away the lower. It thinks however it does not.

On this subject he says the R. is, when a remedy of a lower nature, by any subsequent matter between the parties, is reduced to remedy of a higher nature resort must be had to that remedy - as a bond for a book debt.

But when a party enters into a covenant to perform a collateral act, an action on the covenant, or for the non performance of the cont will lie - the covenant did not grow out of the award. So if A enters into a bond for a £100 if he dont build a house & agrees that he will. 1. Roll. 1. 2. T. R. 104.

See inu that where there is a cont. of a higher nature no recovery can be had on the lower one.

Money won at play cant be recovered if it has

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Action on Bonds.

men paid over to the winner. catch. 150.5. Mod. 13. Bant.
988. contra. 2. Vent. 14

This is allowed in N. Y. to recovered back by stat.
 & in Eng. if brought within a certain time.

Agt is brought for work & labour done by men in
 their profession, as lawyers &c - for goods sold & mon-
 ey loaned.

This is the action upon inimul comp. p. u. a. p. t. & here
 you can't enquire into the items unless one can put
 his finger on any one & say tis a mistake. 4 John. 287.3

When money has been paid to an agent which
 ought not to have been paid, & the agent has bona
fide paid it over to the principal, the agent is
 not liable - but if he is guilty of any fraud or wrong
 he is liable & must look to the principal for remun-
 eration.

Agt upon Sales.

are either express or implied. If the vendor has no
 title the vendee may sue on the warranty, or on an
 agt to recover the money. If the vendor wishes to re-
 cover the price of the article agt. is the action.

If the vendor & vendee have agreed & the vendor makes
 a deposit, & then gives the title afterwards, he may sue
 the vendor on the implied warranty - but the onus pro-
 bandi rests on him, & he may bring agt. for the deposit
 & recover that only, but he can't recover any damages.
Bur. 2639.

Action on Cont.

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Hence the cont. was only in p^{re}mi & bound by the contract - but p^{ro}p^{erty} is not transferred until tender. When the p^{ro}p^{erty} is transferred you can sue only on the tender & Bl. R. 1074.

Sales at Auction The printed terms are always to govern, whatever the auctioneer may say at the time of the sale.

If goods after sale are left with the auctioneer they may be set up again - & if they are sold for a less sum than the first sale the first purchaser is bound to make up the deficiency. 1. H. Bl. 282.

But where the p^{ro}p^{erty} is vested in the buyer he must stand to his bargain, & if there is none on express or implied warranty.

If the sale is conditional, the parties are bound as they make the cont. 1. S. Bl. 189.

Singular case in Doug. Weston vs. Towne

The Ct. don't require in such case that the p^{ro}p^{erty} be returned before you bring the action. 1. H. Bl. 17.

But a separate cont. between the parties may make it necessary.

To vest p^{ro}p^{erty} too unnecessary that actual manual delivery should be given - if there is no impediment to taking it, it amounts to a delivery - Hence the p^{ro}p^{erty} vests when actual delivery is made, or when there is no impediment to hinder taking it - Sometimes the vendor is obliged to deliver, & then if he fails, & damages

sure he must make it good. No action will lie in favour of the vendor as the vendee. Comp. 296.

If a man sells an article & pays it to be made at a certain future day the bargain is closed.

It is now settled that if a man bids at auction he may recant, before the hammer is struck down. 9. E. R. 148.

If the vendee after purchase makes a deposit & then refuses to perform his agreement, the goods are sold again & the vendor brings an action to recover the deposit, this is not settled at L. in Bray it is decided the action will not lie. 1. P. W. 245.

A covenant to sell at auction, is a cont. with all mankind - consequently it is void illegal to bind any person to bid unless the goods go at a certain price - this is a cont. with all mankind that the highest bidder shall have the articles.

It is settled that if the employer tells the auctioneer not to strike off the goods unless at a certain price, & the auctioneer does not for it, he is not liable to his employer. Comp. 325.

When an auctioneer sells goods, he may bring an action to recover the pay in his own name - he has a special privity in them. 1. H. 36. 81.

Apts in cases of Wagers.

It is a received opinion in Com. that no action lies to recover for a wager - At C. & S. there are many kinds of wagers. Comp. 32. 3. E. R. 690.

Action on Bond

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To lay a foundation for a wager the event must be uncertain to the parties - not in point of fact. Bur. 2809.

Thus a wager whether a decree in chancery would be reversed in the house of lords. Bur. 97.

Wagers to introduce an illegal act, or indecent behaviour or indecent testimony, or to sport with the feelings of others are void. Expt. 97.

The action on a wager is exempt aft^r.

By a stat. an action of account is brought to recover rent on a parcel lease, & the agreement between the parties as to what is to be given is the R of damages. In bon there is no such stat - the action here is aft^r upon a quantum meruit, as is a lienant at will.

A tortious wronging is not a subject of this action. 1. Cr. 178.

In bon. if a promise is in writing you must declare on it as in writing, contrary to the S. L.

If a cont of any kind whether bond note or covenant is joint, the suit must be brought in all the contracting parties - if not it may be pleaded in abate^t but no other way - if the d^{ft} pleads any other way he waives the nonjoinder.

If the cont is joint & several, the action may be brought in 1 or all of them but not in part of them - i. e. it must be all joint or all several.

When you sue on such a cont. you need not state that the obligation was joint.

Is disputed if you sue I & insert the names of the others, whether the death is good - tis now settled that it is. Str. 76. 819. Comf. 899. 8.

I have sd that a lower court is often destroyed by a higher one - as a promise to pay a bond - but tis sd if the promise to pay is founded on a new consideration, an action may be brought upon it as in this case - it has a bond in B & calls on him for pay - B says produce the bond & I promise to pay it - then an action may be brought on the promise in case there is a new consideration viz the trouble of getting it. bro. 6. 343. bro. 9. 598. bro. 6. 57. 1. Roll. 11. 317.

J. R. thinks the damages nominal, & that the amount of the bond could not be recovered except on the bond.

A more voluntary courtesy would support an action - but if the thing be in its nature a courtesy, yet if the person was led into it by the offer or request of the other party, the jury will decide if there shall be a recovery R. A. P. 109.

Upon the principles of the 6. A. a recovery can be had for a voluntary courtesy - i.e. A draws a bill of ex. in favour of B upon C, & the drawer refuses to pay at the time - D pays upon protest for the honour of the drawer - An action of indebit. assumpsit is then in B's favour as A - yet tis a mere voluntary courtesy

So it can in favour of a C. carrier who takes goods - Where the consideration of a contract is illegal or tending to an illegal act there can be no recovery - but where 2 persons jointly are engaged in an illegal contract, & 1 party pays the whole sum the other party is, or is not obliged to contribute his share, according to the following A. viz - If 1 undertook

to pay the whole on the ground, that the other on account of his honour repaid the moiety, no action will lie - unless if he paid it with the privity or consent of the other. 3. S. R. 418. 410.

But a knowledge of the fact, that an illegal use was to be made of the thing sold, shall not prevent a recovery, if the sale was a legal one. E.g. if I sell goods to another to smuggle. Corup. 951.

But had the sale been illegal, no recovery could have been had. 4. T.R. 466. 4 Do. 484.

Bonds of indemnity to produce illegal act, are void but this requires some explanation

When a man does an illegal act ignorantly, & he could not know that 'twas illegal, & had no reason to think it was, a promise or bond of indemnity is good. E.g. A person arrests another on a void process & gets a third person to him, & gives a bond of indemnity to secure from harm to good. Wat. 88, Gels. 107.

If I promise to pay to another a certain sum for doing what he ought to do, or is bound by L. to do, the promise is not binding - & if money has been paid in consequence of such a promise, it may be recovered back again in aft. E.g. A Sh. makes a promise, & takes money to execute a process, it may be recovered back again. Rev. 924.

This action is never supported in L. when the claim is unconscionable, any more than in eqty. Corup. 773. 116.

Unlawful conditions are no foundation for this action - what they are can't be defined. 4. Roll. 93.

When the question of indebtedness involves one of right, that can't be tried in apt, this action don't lie. 6 y. bailie taken damage feasant - a common is claimed in the land where they were taken - the owner pays the damage gets the cattle, & brings apt to recover the money paid - it don't lie.

It is a p. R. that the person to whom the promise is made is the only one to bring the action - but it is now settled in Eng & here that the person for whose benefit it was made may bring it as a cestui que use. 1 Str. 5. 192.

Is always bind their employers as far as their employers give them auty. - this is to be determined from the nature of the business. In these cases the S. themselves are not bound unless they make an express cont to that effect. 1 Bl. R. 670. 1 C. R. 182. 1 Do. 674.

When there are a number of partners all must be sued. Str 420 2. B 242.

If not to be pleadable in abate. L. R. 693. 5. 747.

To this R. there are 2 exceptions - 1st When there has been such a severance by transaction between the partner, that there is no ground of claim vs all, but vs only 1 of them - as when there are 3 timber traders - 2 part - but 1 mort. - he may be sued & the action sustained.

2. Where one partner dies all the right of party he held in common goes to the exte - but the right of suing & being sued goes to the survivor - & if the money can't be recovered from the survivor you must sue the exte

A parol agreement before breach may be discharged by parol without consideration - but if after a breach there

must be a consideration, or there is no discharge. 62 C. 680. 1. 324. 2. Mod 44. 259.

A bond may also be discharged by another inconsistent with it - as a promise to marry B in 3 months & afterwards in 4 months.

Tender.

Tender is a good defence in all cases where there is a debt certain to be performed - secus where uncertain depending on the judgment of juries, & rounding in damages - as in case of assault & battery.

But where A engages to build a house for B. A tenders performance & B refuses to accept - the tender is good.

The debt need not be certain in point of fact - yet if it come within the maxim, id certum est quod certum reddi potest, tender is a good plea if it can be measured by some known standard - secus if it can't - Tender is generally a good plea, to an action of assumpsit on a quantum meruit. Str. 576.

Tender is "offer to pay a debt or perform a duty" the tenderer must declare on what account the tender is made - otherwise the tenderer don't know to what debt his assumpsit is to be applied - this is dispensed with if there is but 1 debt. Latch 70. 9. Co. 114. 9. Lev. 104.

So when he tendered in bags & sd, "here take your money" twice bad - he should have presented it - he need not count the money

It has been decided that if the tenderer comes to the ten

deceit & he absconds, tender is a good plea, without actual offer.

It is undecided whether a tender is necessary when the tenderer comes & the tenderer says "go off I want to treat with you!"

It is decided however that an agreement to transfer, an offer, is a good tender - an actual transfer is unnecessary - see formerly Str. 777, 1 Ed. Ray. 656.

The tender is not good unless the whole sum be tendered - for a man is not obliged to take his money by parcels. If more be tendered than is due to good. Str. 916.

Sometimes a debt is payable in money, & sometimes in something else. If to be payable in money or other articles at the election of the tenderer, a tender of either is good - but if at the election of the tenderer, the tenderer must go prepared

If money is to be tendered a question arises what money answers? the answer is, that money which is made good by L. copper coin is good to make change, but not to pay any considerable sum.

Current coin of the U. S. is good tender - there is no precise R. as to the quantity of change.

If money once tendered depreciates is a second tender of an equal sum good? it has been decided in Ireland to be good - & on principle to be clearly correct.

It is laid down in Boker Rep. that if money is tendered & received, & happens to be counterfeited the tenderer has no remedy. S. Co. 118, Co. Litt. not true.

If both parties supposed it good, the note is discharged - but aft^r his to recover the balance due.

In the U.S. bank notes are no tender - the reason is, our banks are so numerous.

In Eng it has been decided in ~~chry~~ that bank notes are a tender if no objection is made to them on that account. If tender be made in articles they must be merchantable in point of quality, & this is to be determined by the circumstances of the case.

The effect of a tender.

This is different, in different cases - Sometimes it discharges the debt or duty, & sometimes only the damages. In all cases where a lien is created tender discharges the debt & g. A mortgage of land - tender being made when the money is due, discharges the land.

When heavy articles are to be tendered, a tender of them discharges the debt or duty. E.g. A promised to deliver 100 head of cattle - tender of them discharges the debt. The tenderer is not bound to take care of the cattle he may let them go.

But as to small articles & money, tender only discharges the damage - the debt or duty remains - not the same debt or duty - for after tender, the tenderer becomes bailer. So there is no liability on the note for non performance - the moment the tenderer brings money into it the judge is in his favour, if he has made good tender - & the tenderer has his costs to pay.

The tenderer is a bailer & is bound to use ordinary care.

It is a *q. R.* in the *L* of tender, that whoever tenders money shall receive the same advantage as if he had paid it. On this ground it is, that the case of the depreciated currency is reconcilable.

When a tender is once made, tis the duty of the tenderer to have the money to pay over when called for. Not that he will be subjected to an action if he don't, but that the effect of the tender will be destroyed.

But tis not the demand of the money ought to be reasonable - i.e. made at the tenderers house. 1. Broome's W. L. R. 978.

After a tender is made if the tenderer wishes to destroy the effect of it, he must make a demand at the house of the tenderer - a demand then unaccomplished with produces this effect. Where the mortgagor tenders money to the mortgagee, it destroys the lien. L. Litt. 207.

But in this case he must make an oath in an adjournment in *eqty*, that he has made no use of the money - i.e. the mortgagor must - since he must account for the money.

The absence of a party so that no tender could be made renders a tender unrecapary - & all that he has to know is that he was ready to tender at the time & place agreed on.

Tender must be made at the time & place agreed upon by the parties. & if no place is fixed upon it must be made to the person wherever he is - this means it must be made at the place where he was presumed or supposed to be.

If the party has removed & the old place has ceased to be his fixed residence, & if you know of his removal you are subject to it.

Altho as a G. R. he is bound to go to his residence, yet if he finds him in a different place, at the time, tender to him there is good & must be made.

So if the mortgagor desires to tender & goes to some convenient place, & notifies the mortgagee to receive the money there, the tender is good.

In Eng. there are some exceptions to this R. landlords are not obliged to go to the landlords to pay rent - tender on the bond is sufficient.

As to the tender of heavy articles, the R. is different. If the place be agreed upon by the parties, the R. is the same. But where no place is mentioned the R. is "delivery at the dwelling house of the tenderer".

But if he has removed, & it will be no greater detriment to tender at the last place of residence, he must tender at that place - secus if it will.

If the debt is assigned as a note, you must tender to the assignee if you meet him - if you don't you must go to the assignor's house & be ready to tender to the assignee, & this operates as a tender. You must not pay to the assignor.

After an action is commenced no tender is good, i.e. adversum - but if the debt tender, the debt interest & cost, will stay the suit. Bro. C. 264.

Suppose the place is agreed on & the time is the 1st of July or 1 month after, when must the tender be made? If the tender is to be found at the place on the first of July, it must be made there - if not on the last day of the month - the reason is, because the

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at his election bro. 8. 79.

So if on or before such a day - the same principle governs. 8. 60. 114.

If tis made on the last day it must be on the most convenient part of the day. How. 172.

If money is to be tendered, it must be tendered so as to be counted by day light & no of heavy goods put into the hands of the tenderer. 6. Litt. 209.

If tender cant be made on the utmost convenient time, it must be made within the hours of business as regulated by custom. Str. 744. 7.

If A. B & C. have a joint demand, & C a separate one on or vs D, & D offers to pay A both the demands, which A refuses without objecting to the form of tender, on account of his being entitled only to the joint demand - D may plead this tender in bar of an action on the joint demand, & he should state it as a tender to A. B. & C. 9. C. R. 689.

Deft cant plead non apt as to part & tender as to part. 4. T. R. 194.

Nor can he plead non apt to all counts & tender under 3. Will. 148.

If no time is fixed the debt is payable on demand & in such case the debtor must give notice that at such a particular time, he will be ready to pay, & at such a time tender will be made, unless there is a reasonable objection. 60. Litt. 211. & 60. 92.

When the time is no fixed, a tender at any time at the place mentioned is good. 5. Co. 115. Bro. 8. 115 or 114.

Tender to an assignee is good when he is a proper person to receive it. this depends on the circumstances of the case. Bro. 8. 725.

If Pldg a Tender

Here the dft must state the day on which the tender was made, that it may appear to the ct that it was made at a proper time - he must not only state the day, but that it was on the most convenient part of the day.

He must state that the plt refused to accept the money unless he was absent - if the plt was absent he must state as before, & also that he himself was at the place mentioned, & ready to tender & that no person was there to receive. 3. Bro. 104. 1. Kid. 13. 2. Bro. 28, 2. Bent. 109. 2. Lamm. 152. Bro. 8. 389. Ed. Ray. 687. 2. Ed. Co. 206. Bro. 9. 252. 1. Shaw 129, 1. Lab. 295.

If the debt or duty is discharged by the tender, pldg as before directed is always sufficient. Co. Litt. 107. 9. Co. 79.

But if the debt or duty is not discharged by the tender you must say that you are still ready to tender & actually do tender in ct. 1. Shaw 129.

If the debt or duty arises at the time of the cont you must say you have always been ready to tender 10. Mod. 61. Ed. Ray. 254.

Concerning bulky articles tis not decid whether you may

bring them into it or not, to lender - concerning some of them there is no doubt - as cattle, hogg &c. 3. T.R. 689.

Upon issue closed to a plea of lender & found in the p^lt^t the money belongs to the p^lt^t & a verdict is given for the d^lt^t. 1027. Lat. 597.

The d^lt^t can't plead non apt as to p^lt^t & lender as to p^lt^t 4. T.R. 144.

Now can he plead both non apt & lender - for the plea would be inconsistent. 3. Wills. 148.

Award

Is an universal R. that an award is a bar to a suit founded on the original cause of action submitted.

An award is the judgt. or choice of persons elected by the persons or parties to arbitrate on the things submitted to them, see D. Arbit. A.

On this subject the L. has undergone a great change. To constitute an award 5 things are necessary 1st A matter in controversy 2nd A submission 3rd Parties to the submission 4th. The award or arbitrament 5th. Giving up the award Dyer 217. Hard. 44.

1st A matter of controversy is absolutely necessary.

2nd A submission - this is of 2 kinds - by consent of the parties & by R. of Ct.

The former may be either by parol or in writing 2. Mod. 78.

When the submission is by parol, it may be either a simple agreement to submit, with a promise to abide by the award, or with such a promise & this promise may be with or without a consideration.

The R formerly was different, that the promise must be with a consideration, if the award respected any collateral act or thing - secus it would not be enforced.

Ed. Ray. 248. 242.

But the R always was, when the promise was to pay money & not to do a collateral act, the promise might be without consideration & they would enforce it.

The R now is that there is an implied promise to abide the award in the submission. C. Mod. 35. Salk 74.

Ed. Ray. 961. 1039.

The common way now is to give bonds to abide the award, which are perfected by a refusal to abide.

One however sometimes submit to an arbitrator be fore there is any controversy. E. g. A & B. enter into a partnership - they agree that if any dispute shall arise between them it shall be left to 3 men, such an agreement is good. Com. & lib. arbit. d.

Does such an agreement to submit oust it of the jurisdiction of their jurisdiction - or if an action is brought by one on a bill in chry, can this agreement be pleaded in bar to the action or the bill? Chry have decided that they can give no relief to the partner till he offers to submit. If he does & the other party refuses, or the arbitrator refuses to sit as such, or will make no award then the court will grant relief. 2. Atk. 585. 2. Br. 64. 396.

It was decided in a late case that a J. of L. is not ousted of its jurisdiction, but that they will support the action.

It has long been settled that such a restriction can't be made upon 2. or more by a third. 10 Mod. 59.

2nd Who may submit, or the parties? any one may, who can make any other cont. bono. d. arbit.

consequently idiots lunatics infants & feme covert can't.

As a J. R. that an infant can't submit to an arbitration - secus formerly - he is bound only for the value of the articles. 1. Roll 264.

An adult may bind himself that an infant shall submit to an award - secus formerly - the reason is, that the submission of an infant would be void. bono. d. Lee 17. Latch 207.

An exte may submit the suit of his testator & is bound by the submission to abide the award. 1. T. R. 691. & Do. 6.

But tho the exte may submit this dispute, yet if the exte can prove conclusively, that the exte could have got more than the award, he must pay the ballance out of his own pocket on the deficiency of assets - & if the award is published, & the exte refuses to abide, & an action is brought as herein he can't plead deficiency of assets - for he may be attached for non pay^t. 7. T. R. 450.

The submission of an exte & is no admission of assets, in an action brought as herein by another exte, not a party to the submission. 7. T. R. 458.

This submission binds all the parties, & all those who have

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given others only to bind them - so if 1 joint partner in ²⁰⁵ matters of copartnership should submit, this submission binds the others also. 2. Mod. 225. 238.

So the act of an agent in submitting binds the principal. A submission by the H. in all cases where the subject matter is such, that he can dispose of denying coverture binds the W. Style. 351. 1. Roll. 246.

If the testator submits to an arbitration & then dies, this submission binds the exec^r - formerly no action of debt would lie vs an exec^r ^{the non pay^t of} ~~for~~ ^{an} award submitted by the testator. Bro. 8. 600 - Now now this action may be brought. Id. Ray. 428.

4th What things may be submitted - All ~~free~~ actions & things may be submitted, & also those whose nature is uncertain. Com. D. Arbit.

But a dispute respecting a title to a freehold of lands of inheritance can't - i. e. no title passes by the award - for that don't compel either party to give a deed.

In Scot tis otherwise - but in Eng. no freehold can come in future. An interest in an estate for years can't be transferred by an award - for this is a chattel real. 2. Rev. 104. Bro. 8. 929.

So what things does this submission extend to? - this depends on the words used - suppose they are, "all actions & complaints" - but if only the word "actions" it embraces only the actions pending at the time. 1. Roll 245.

If tis "of all demands" it includes every thing. Hayne R. 99.
If all debts it includes all obligations & judgments. 2. Saund. 190.

If "of all differences" it means all demands

When may a submission be revoked? At any time before award. 1. Sed 281.

If ^{it is} revoked a suit lies on the original cause of action. S. 60. 31. 2 or 5

If two or more join in submission & all revoke. S. 60. 30. J. R. thinks one can. 1. Roll. 391.

The act of 1 is the act of both.

If a submission is made before award by a feme sole who reaver before award, tis a revocation in S. 60. D. Arb. tit. 2. 5.

If a feme sole & another person submit on one part, & the feme reaver before the award tis a revocation as to both. 1. Roll. 391.

If there is a submission & a bond given, a revocation of the agreement is a forfeiture of the bond. & if no bond is given it now lays the foundation for an action on the case. S. 60. 32.

A revocation is of no avail unless notice is given to the arbitrators. 1. Roll. 391.

If the same persons who are selected as arbitrators by the parties, are made commissioners by the Ct of Chancery to determine the same differences, this last appointment is no revocation in S. of the submission. 1. Roll. 391.

Persons of no name memory or those who recent discontinue
business, persons who are misgeris, penes covert, those
who are disinherited mortuus, persons attainted of treason
or felony come to actus, 4. Mod. 226

If the actus don't agree, tho the submission of the par-
ties after is, that they will stand by the umpirage
which is sometimes chosen by the parties & sometimes
by the actus, according to the terms of the submission
& the person so elected is called umpire.

When the parties have the power of election, they can't
leave it to chance, if they do the umpirage is void
because the parties leave it the sound discretion of the
actus to choose an umpire & not to chance. 2 Re. 585.

The umpire may make his umpirage at or before the
time, the actus make their award, & if the actus make
no award the umpirage is void. Tom. Jones 162 2. Re. 100.

If the actus fail to award at the time they were sworn
their failure is conclusive evd of a refusal & the umpi-
rage is good.

The actus when they have the power of electing may ex-
ercise it at any time, & they usually do it before they pro-
ceed to arbitrate. 2. T. R. 648.

See formerly. 1. Sal. 7172.

The actus can continue to appoint in infinitum till an
umpire accepts, 3 Lev. 268, 1. Kent 114. Snow 76. 5. Mod. 147.

4th. Award itself. Awards are to be construed liberal-
ly & favourably - see formerly. 1. Bac. 274.

To constitute a legal award it must have certain qualities. 1st. It must be pursuant to the submission i.e. it must not respect any thing not submitted. bon. d. lib. art. 6.

As far as it relates to a part not submitted, is void - twas once so it contaminated the whole - twas that twas all good - but neither is true now - the R. now is that if by construing any part of such award void, manifest injustice is done, the whole is void. But if no injustice is done by construing that part to be good, which the submission intended, it shall be so construed - the rest is void. 2. Mod. 309.

If the controversy is concerning the merits can the arbitrators award a sum of money? tis so they can only decide the right of party - they can ever in that case award a sum of money bon. d. art. 5.

Can they award any collateral thing in satisfaction of a legal injury? Hyde thinks not, the arbitrators are to the contrary. 1. Ld. Ray. 1039. 1. Sal. 76.

It has been decided that where parties in trade submit "all matters in dispute" & the arbitrators award that the partnership shall be dissolved, tis within the submission. 1. 76. 2. 573.

If the reference be of all matters in difference in this cause, & the award is general, tis good as to matters referred, & void as to the residue. 2. Bl. R. 1117.

This depends upon the distinction, that a submission of all matters in difference in this cause is simply a reference of the cause in question - but a submission of all matters in dispute is general. 2. Ld. 677. 3. Do. 626.

An award that some claims arising after the submission may be given in satisfaction of something existing before is within the submission & of course good. 1. Roll. 224

Formerly it was held that no award compelling a man to pay costs was good. 1. Roll. 254. 2. Bro. 598.

Reason - bonds always answer after submission - but is now judicially settled that the power of awarding costs is necessarily incident to, or consequent upon the power conferred upon the arbitrator, of determining the cause & when a provision is inserted in the submission to a restriction of the ff. power of award. 2. J.B. 635.

Good Quality. An award must not extend to any one who is a stranger to the submission - if it does it is not pursuant to the submission & by the old R. is void in toto. 9. Lev. 62. 1. Roll. 259. 7.

But in modern decisions the award to a stranger is never void, unless it is so manifestly detrimental to the stranger, or unless he complains of it. 5. Co. 72. 11. 40. 191. 1. Ed. Ray 123.

It is always to be presumed that when an award is that 1 person pay so much to the other it is beneficial. 1. Salt. 74.

If then it includes a stranger to the submission, if he refuse to comply the whole award is void, unless the party in whose favour it is, takes up with the award without his compliance.

When there is a submission of all disputes between A. B. & C. on the 1 hand & D. on the other, it means a submission of all joint disputes, between the parties - i.e.

between A. B. & C. on the one part & D. on the other.

3rd An award must be entire - i.e. it must not be concerning a parcel of the thing submitted - it must be of the whole dispute. 1. Roll. 236. B. 60. 98.

The old B was that if the award was not concerning the whole thing, it was void in toto.

The B. now is that it must be presumed that no other things were shown the arbiters than were awarded. - & if there were the parties who object to the award incur the onus probandi - if he can prove it, it may be set aside. This presumption arises from the maxim that when a man has a trust committed to him the L. presumes he will perform it well & faithfully. Bro. 6. 118. 1. Bur. 274. Bro. 4. 663. 400. 200.

4th It must not be do any thing contrary to L. if so it is void.

Under this head has formerly holden, that if arbiters awarded that damages should be given where none could be recovered at L. it was void. 1. Sid. 12.

This is not L. now - for if A charges B with being a liar & they leave it to arbiters who decide that he shall pay B. £20, tis a good award, tho no action would lie at L. 2. Kent. 248.

The award in the 5th place must be possible - necesse tis void. 1. Roll. 224.

But if it becomes impossible by the act of the party himself, or a stranger tis valid. 2. Mod. 29. 28.

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6th It must be reasonable - Many things are unreasonable at L. - as that 1 party serve the other this is void. - the reason is, was not in contemplation of the parties so generally if any thing is awarded that court is supposed to be contained in the submission is void bro. 6. 226. 3. L. 193. 1. Roll 34. or 134. 143. 4. 8.

So that one party pay part of a debt, when is clearly one part of a just debt, is void. for a man is not obliged to receive his money by parcels. 2. Mod. 304.

When, it must be left to a jury, if is reasonable or not.

7th It must be advantageous - i. e. not unusual - as that one party wash his hands this this would be sometimes necessary.

An award that the parties go quit of each other is good. 1. Roll 252.

An award that 1 shall enter a return in a certain suit is good. Hyd. 124.

8. It must be certain - by the old R. it must be certain on the face of it - but now. id. certum est &c. so if the thing can be ascertained by any known R. or standard is good - as an award to pay the costs on a certain suit. bro. 1. 525. 1. Mod 195. 1. Sal. 75. 2. Hut 248. Gauth 157. Ed. Ray. 124.

But that one pay as much as in good conscience he ought is void, for want of certainty. 2. Saund. 272.

So an award that one party shon't molest the other & awards given to that effect without specifying the sum is void. 9. Co. 74. bro. 8492.

An award that the pltff shall have so much money paid him by the dftd unless within 21 days he shall exonerate himself by an affidavit from certain payts & receipts in which case he may pay a leg certain sum - this is uncertain & inconclusive. 1. Roll. 76.

9th It must be final. i.e. such an end must be put to the matter in dispute, that no suit can be brought on the original cause of action - hence if it is so stated by the award of such a number of men is bad, 1st because it is not final & 2nd astors can't delegate their duty. 1. Roll. 224. 9. Mod. 272. 1. Roll. 251.

An award that each pay his own expenses is good. Str. 909. Osb. 274.

Astors may award a thing to be done at a future day if the thing don't depend on a contingency. Palm. 110. 1. Sed. 52. 7. Mod. 315. 2. Wills. 248.

If tis bad in part, it may still be good as to the residue - this was formerly questioned. 2. Sand. 299. 2. Wills. 268. 293. 2. Mod. 169. 1. Wills. 62. 66. 2. R. A. 1113. 2. Lev. 155. 1. Show. 128.

When is an award void in part & when in toto - when tis void in part the obligation rests on 1 party & that part only is void if the other party is willing to accept what is rightfully awarded. bro. 8492. 2. Lev. 6.

When the mutuality of an award, intended by the astors, is destroyed by its being partly void, this makes it void in toto. bro. J. 577. 10. Mod. 201. 2. Sand. 299.

When ever the award is out of the submission, & the astors award an aggregate sum for the injury intended & 1 sum without the submission & award is void in toto. bro. J. 639.

When 1 party is to perform several acts, ^{some of which are} not included in the submission, in consideration that the other party pay a sum in gross, the former is not bound by it, & if he fails to perform the latter is discharged - secus formerly 10 Ep. 191. 12 Mod. 587.

If part only is void as not being within the submission, & the mutuality intended by the award is obtained in good as to the rest. bro. J 352. Id. Ray 117.

E.g. Award is, that A pay 40^l in lieu of all demands up to the submission, & that B execute a release up to the award - now a release ligd up to the time of submission is good - is void only after that.

If tis awarded that one party do what is not included in the submission, & the other is willing to accept that part only which is & the mutuality intended is obtained, the award is good. 2. Vent. 246.

The award may be written or parcel - provided there is nothing to the contrary in the submission - & when tis by parcel, no particular form of words is necessary provided the substance & the effect appears - The award need never be couched in any particular form of words, unless so expressed in the submission Salm 121. Bro. notes 56.

Mode of proceeding when the awarders are chosen. Awarders have power to notify the parties to meet at such a time & place, or the parties the awarders & this is calling out the awarders.

The awarders may adjourn from time to time as they think proper provided, they make their award within the limited time.

They may make an award when one party is absent unless he has revoked.

After the parties have partly finished their enquiry can the umpire take the case as it then is & settle the whole? The old R was that he could not this is clearly correct in point of principle - now the modern practice, Barn, 2 Arb.

When a controversy is left to the arbitration of 2 persons & nothing is said as to any 2 of them, they must all join in the award - for their power is joint - In this case held by some an award by 2 is good. Barnes 57.

If they have joined in making an award, must they give notice to the parties when the will deliver it? No - unless if the award is not made before the time specified in the submission - but if any thing is to be done by either party before that notice must be given. Barn 67. Barn 6. 132.

If the submission contains this "they may make an award provided they deliver it to the parties" - here notice must be given to all the parties - but a delivery to 1 is a delivery to both, if the other refuses to come. 7. 62. 119. Barn 6. 309.

Does a parol award satisfy the delivery, there being no words requiring it to be in writing? The it decided that it was good. Dyer 214.

In a certain case the words were "provided to be ready to be delivered" - here Holt said that he thought the intention of the parties was, that it should be written out on the entry of the case in Dyer he decided that the parol award was good. 6. Mod. 160.

Action on bond

If several things are submitted, the arbiter must make²¹⁵ their award at one & the same time & not at different times on ^{each of the} different subjects Palm. 100.

But they may reserve a mere ministerial act beyond the time limited in the submission. Hard. 43.

e. g. As where several articles are to be appraised & their award.

Arbiters can't delegate their power unless empowered by their submission. 1. Sal. 71.

Lord Holt says the arbiters may the manner of carrying it into execution. Sal. 75. 1. Sid. 358. 600. 2. 930. 2. Atk. 501. 519. Ser. 1321.

They may make their award on the day of the submission unless ordered otherwise.

Performance of an award.

Sometimes it need not be literally performed - for if the party in whose favour it is, will accept something distinct from it, or direct to accept for him the compliance.

Parol proof is admissible in this case, to show such acceptance or direction.

When 'tis impossible to perform it literally, & a compliance in substance will equally benefit the party in whose favour it is, such performance is sufficient. e. g. Award that A give B such & such a will - which will is in the hands of the ordinary here a copy will do - so if the will is lost. 6. Mod. 36.

When a different performance is accepted, he pleads his
 performance, & then shew the party accepted a different one.

Remedies to compel a Performance.

If the submission is verbal & there is no covenant or
 bond to abide the award, an action of assumpsit or debt will
 only lie - & if to do a collateral act assumpsit only lies.

A bond or covenant being given to abide the award,
 debt or assumpsit or an action for breach of covenant, or on
 bond will lie. Str 929.

If an action is brought on bond, it proceeds in the follow-
 ing manner - the declaration is in common form on the
 formal part of the bond - Itt pleads prayer of the
 condition - recites & pleads no award - the plea in his
 replication avers an award states it at length in his
 replication on the record, & assigns a breach. The reason
 why the plea must so plead, is that the words "no award"
 in a plea in bar, sometimes mean no legal award &
 sometimes none in fact - so if he don't plead as above
 he closes the issue to the jury - a question of L.

The plea either rejoins in demurrer if the award is il-
 legal, or may join no award - this in replication means
 no award in fact - there are the 2 pleas he can make to
 such a replication. 1. Sed 370. Lutw 386. Cro. J 273. 2 Mod 77.
Hard 499. 1. Shaw 98. 252.

The plea must also state that every thing was awarded
 contained in the submission. Benth 188. 3. Mod. 390.

Sometimes the plea must perform an act on his part, pre-
 cedent to his right of action on the award - he must

if so aver performance in the replication

A tender & refusal will answer the same purpose as performance itself - consequently if he was tendered & the other has refused, he must plead it. Hard 49. 1 Mod 36.

The p^lt^t must assign a breach, or there is no cause of action, & no subsequent p^ld^g will help this want of assignment. Yelv. 24 78. 159.

When an award is good in part & bad in part, & a breach in the bad part only is assigned, the d^{ft}t may demur & there can be no ~~debt~~ recovery - the breach must be assigned on the good part. 2. Mod 307. Ld Ray. 114. 123.

This is the usual way of p^ld^g in actions on the bond.

Suppose the d^{ft}t's defense is never submitted, then he must plead that twice was submitted - he can't plead non est factum - this implies submission. 1. Sid. 270.

If the award is that money be paid on or before such a day, 'tis necessary to aver that the d^{ft}t did not pay on or before such a day - to say he did not pay on the day simply is bad - he might have paid before 1. Vent. 224. 2. Lev. 299.

But an averment that the d^{ft}t did not day according to the tenor of the award is good. Id. Supra.

If the award is to pay money when requested, this request must be made before the d^{ft}t is liable - & consequently the d^{ft}t must aver request. Bro. J 620.

If the award is the alternative the p^lt^t must aver he did neither.

In assigning a breach of an award in an action on a bond, formerly it was said he could not assign but one breach - the reason was not to burthen the record & involve the jury to find a number of breaches when one would answer.

But now is, you need not assign but one, tho you may a number. 2. Wills. 267.

When the dftt admits a breach by pledg some collateral act, the ptt in his replication need not assign any. Bro. J. 300.

When there is a submission of all matters in controversy with a proviso that the award be made of the premises the dftt after praying oyer may plead that the arbitrators did not award about the premises.

The ptt may then set out the award at length, & it will then appear on record, whether true so made or not. The dftt may reply to this in his replication, that there were other matters of which the arbitrators had notice - the ptt can only surjoin that the arbitrators had no notice & here issue is joined Bro. J. 206. Paum 912.

If the conditions of the bond are illegal on the face of it - & the dftt prays oyer & recites it, the dftt can only demur to it.

If the award itself is illegal on the face of it, & the dftt prays oyer & recites it on record, & avers that its illegal, the ptt replies to the plea by stating the award, & traversing the point of illegality. Bro. E. 334.

But the dftt has still a different defense namely, forfeiture - here he sets out the award on record & pleads

performance - then the plt may reply in traversing the want of performance, or by demurring specially. When the dftt has improperly stated the method of performance

Formerly the dftt in pleading performance must show the manner in which performance is made. In modern R. it is that an averment of performance generally is sufficient.

J. R. thinks the true R. is, when any question of L. can arise, by reason of the manner of performance, the manner ought to be averred - & when no such question can arise an averment generally is sufficient.

But if performance in point of fact has not taken place the dftt may plead tender & refusal, & if the dftt was not at the place to receive the things tendered he must plead simply tender.

In pleading tender to an award you must plead that you have always been ready to perform.

If the defence is that the plt was to do an act precedent to the right of action, non performance of the act is enough to plead.

If the dftt pleads no award in point of fact, the plt may reply a revocation by the dftt - & the dftt can make no answer to this, but by traversing. 3. J. R.
§ 72. & Co. 81.

Sumption by a R. of Co.

This a regulation in Eng. by 2. & 10. stat of Hen. - but they were known at E. L. before any such stat. 1. Sid. 52. 154. 11.
R. 38.

This rule makes that all persons desiring to end suits be may agree that their submission be made by a R of any of the judges & of record, & may insert such agreement in the bond whenever they submit, & on an affidavit of one of the witnesses thereof a R of it shall be made, that the parties shoud the award of such arbitr or umpire - & the party disobey the award, the ct on motion shall issue process of contempt which shant be stopped by any ct of E or Cts, unless it appears on oath that the parties have misbehaved themselves. Com. D. Dist.

It is decided under this stat, that the ct have no power to make a final submission a R of ct. 7. S. R. 1.

It is decided that the ct will compel a witness to make affidavit of the execution, in order to make it a R of ct. Str. 1 Banner 54.

A submission may be made a R of ct on motion by 1 party, & his producing the bond executed by the other. Banner 55.

If the submission be made by a R of ct, that it will enforce the award without making it a R of ct. 1. Sal. 78.

This submission must actually be made a R of ct to authorise a process of contempt - for a bare consent to make that submission a R of ct, will not authorize that a or any other to interfere 2. Str. 1174.

To authorize a process of contempt, this submission must be made a R of ct prior to making the award, i.e. to using the submission within the stat - it must be prior to the publication of the award. 3. P. W. 361.

It will not set aside an award on the ground that

the witnesses were not examined on oath, if no such objection was made at the time of the examination.
1. R. & P. 91

The power of the court of which the submission is made a R. is discretionary, to issue an attachment.
1. R. & P. 258.

If a party do not obey an award published in consequence of a submission, made a R. of it, an attachment shall issue, unless he shew cause to the contrary on notice. Reg. 38. 1. Sid. 512. 1. Sal. 89.

An agreement enlarging the time for the award to make the award must contain an agreement that it shall be made a R. of it - never shall be or no attachment will issue for contempt. D. T. R. 37.

The court must grant an attachment for non performance of an award, on the affirmation of a Quaker - because he is a criminal process. Str. 441.

An award, made a R. of it, can be set aside only for fraud, or corruption in the award & then by the words of the stat.

Yet if there are no other defects on the face of the award, the court must issue a process of contempt for non performance - they will leave him just as if the submission had not been made a R. of it. Anderson R. 297. 4. R. & P. 79.

Nor will a court do this, sending an execution brought on an award - neither will they allow the party to revive his action for the purpose of applying for an attachment. 1. R. & P. 81. See formerly, Hut. 206. Str. 695.

If the award awards that each party pay a moiety of the expence & 1 party pays the whole, the party may have an attacht for contempt vs the other, if he wont pay his moiety. 1 B. & D. 79.

The mode of obtaining an attacht is this - when the party refuses to perform the award the p^{ty} goes into it, & upon affidavit states that the award was so & so, & that he showed it to the d^{ft} who refused to perform it, & concludes by praying that a copy of the B of it may be served upon him, & he compelled to answer why he dont perform.

This process issues of course & is served & affidavit is made that he dont appear & then attacht for contempt issues of course.

If he does appear the ct will consider the award, & if they find it legal they will order him to obey it, & if he dont, issue process of contempt. 1 Sal. 79. 10 Mod. 839.

This attacht is no satisfaction - hence after it you may take the d^{ft}s body on an arbitration bond. but if the body is taken on execution issued on judgt, for non performance of the award, the right to attacht for contempt is gone, because now the body is a satisfaction. Br. 82. 227.

In this state they wont grant an attacht when there is another remedy.

When the award is to do a collateral act they have interposed to compel a performance of that thing - where money is awarded they will never interfere because an adequate remedy may be had at B.

When they don't interfere it exercises a discretionary power, & when submission is made a R of this it they will interfere to compel a performance of the collateral thing. If the submission is a mere voluntary one, they won't interfere unless there has been an acquiescence in the award, or a promise to perform it subsequent to the award. 1. Att. 74.

They won't compel the debt when he has promised to abide the award, to disclose a breach so that he may be liable ~~for~~ the forfeiture of the bond.

What may be pleaded in bar.

Any legal award may be pleaded. i.e. any award of which the party has the means of compelling performance. A legal award is a bar to the original action. 1. Sab. 59. Lut. 56.

But a submission made between the ptty & a third person may discharge the debt - As where A sue & attach B. & B is bail - A & B. then submit the difference to arbiters - & they publish their award - B. may now if need plead the submission & performance

A recovery by one of 2 or more is a bar to a recovery by either of the others - if that 1 & the ptty submit, the award is good - & all the parties may plead in bar in the same cause of action, as in the case of joint trustees - when 1 submits. Com. R. 328.

A submission may be a temporary bar to an award - As where A & B submit to an award to be published in Jan - this bars an action Decr.

An illegal award is no bar to an action i.e. the original cause of action.

In what cases & its may awards be set aside? In a ct of L. it can be set aside only for cause appearing on its face & Ver. 415.

In eqty it may for other cause. The lg. R. is, that an award consequent upon a voluntary submission, is not to be set aside whether rightfully or wrongfully made. 1. P. W. 223. 2. Atk. 495. 1. Atk. 64.

So that there are exceptions. When compared with the submission & it appears that the award has gone contrary to L. either by mistake or wilfully - as where they have mistaken materially, the award tho consequent upon a voluntary submission, may be set aside in a ct of eqty. 2. Ver. 305. 3. Atk. 645. 1. Atk. Ray or Atk. 69. 2. Ver. 316. 1. Atk. 64. 2. Do. 155. 376.

A ct of eqty will not set an award aside, where the submission is voluntary - a ct of L. can not. Hyd. 227. 1. Bl. Co. 276. 2. Ver. 515. 3. Atk. 252. 496. 4. 1. P. W. 262. 2. Ver. 317. 2. Ver. 305. 485.

An award which is consequent on a submission that is made a B of L. can be set aside in L. or in eqty for 2 reasons. 1st When an error in L. appears on the face of the record you may dissent to the award Hyd. 227. Amb. 245.

2. When there is partiality or corruption in the award, it may be set aside by shewing cause, why the R. for an attachment should not be made absolute. Ut supra.

Accord with Satisfaction.

It is a defence to all frat actions of bonds, & on b. & b. principles to all actions but 1- in bond to all.

By this term is meant an agreement to take something for an injury, & an actual receiving it. Ac. is the agreement & sat. is the receiving it.

Ac. is no defence to an action arising from a specialty - for tis a maxim that a specialty must be destroyed by an instrument of as high a nature as itself. But an instrument under hand & seal to discharge a specialty is called a release, & must be so pleaded. 6 Co. 44^a Bro. J. 650. Bro. 846. 4 Co. 79^a. Dyer 1.

But this is a good defence to all actions when damages alone are to be recovered. Dyer 75. Brownlow 194.

It is a good defence to ass't & account. Lutes 52. Bro. 6. 116.

So tis to trover - so too to detinue - likewise to an action of covenant after tis broken - for the cause of action arises by the breach & not by the deed. 9 Co. 76^c 8 Co. 46^a 2 Roll. 163.

Locus before inack. Lutes 359.

It is no defence in real action, when the inheritance or freehold is to be recovered - for it can give no title - this must be by deed or will. 9 Co. 79^a.

To make a legal defence it must have certain qualities. It must be in satisfaction of the thing demanded. i. e. there must be a consideration for the agreement, which is deemed valuable in l. - it must be some promissory ad-

advantage or disadvantage. 2. Roll. 96. 1. Do. a 178 Dyer 356.
Butter. 184.

This satisfaction must be in full satisfaction - i.e. it must not appear on the face of the record, not to be a full satisfaction - if it does be denumerable. 8. G. it release of an esty of redemption - the being of no value in a ct of L. 2. Wills. 86.

In case under this plea of ac. you may give in anything of value in ext., either in R. or esty.

A plea to an action of ap^t that the dftt who was the payee of a promissory note, endorsed it over to the p^lty for & on account of rd debt, was held good. 8. T. R. 513.

This accord must be certain - i.e. it must not be conditional. Yelv. 125. 4. Mod 88.

Altho the performance is shewn by the dftt to be on law, yet if the ac. is uncertain in its foundation the plea is bad. Yelv. 125.

The ac. must be exacted - i.e. the thing agreed to be done must be done - there must not only be an agreement to indemnify, but an actual indemnification.

There are at B. & 2. methods of pldg ac. 1st by pldg the ^{satisfaction} accord by way of satisfaction ac. i.e. the p^lty & dftt agree & ac. that the dftt should pay & that the p^lty should receive a sum in satisfaction of an injury & that he did receive it. This was the old English way of pldg & is now the com. one.

2nd Read the ac. by way of satisfaction only - i.e. that

that the debt gave so much in satisfaction &c that the debt received. 7. Co. 80. 2.

It is indispensable to state in the plea that the debt received it - otherwise there may be a demurrer to it. 1. St. 188. 682.

The best is now the usual method in the English courts - tis the best way - because tis a settled R. that he if he pleads by way of ac. must shew a precise, literal performance 7. Co. 80. 2.

But where he pleads by way of satisfaction tis sufficient to shew only a substantial performance i.e. tis enough if he shews that he has satisfied the debt for the injury.

If a man pays money on a void account, he can plead it by way of ac. & sat. or by way of sat. he cant plead as on ac. because the ac. is void. 1. Salk. 21.

Infancy.

Infancy is *primò facie* a good defence in all courts - if he is bound by his courts, as he is not generally, the other party must prove it.

But he has no defence in torts - unless the tort can be committed ^{only} by one who is *doli capax*.

It may be a good defence to an action of slander & is conclusive if the infant is under 7 years of age - because the presumption of L. is, that he is not *doli capax*.

If the infant is over that age & he still pleads infancy, the plff must show that the infant is within years of discretion - & then the dftt must traverse the fact - & the jury decide it.

Old cases say an infant may plead his infancy in an action for fraud & that the plea will be good. This is doubted by Mann. & Keble & Freeman - is opposed to analogy for he may be indicted for fraud.

In the action of ass^t infancy may give the *q. ipsum* - because every thing which shows that the plff had no right to recover, may be given in evd und the *q. ipsum*.

Edmonstone says it must be pleaded officially because the courts of infants are absolutely void.

To a plea of infancy in court only 2 replies can be made 1st the dftt may show that they were *non infantes* - & if liable for *non infantes* permitted him to a replication that they were permitted to him is good. Str. 168.

If they make furnished before me over to his indebted-
 W. tis bad. So if he could for his child he is
 liable. But if the articles furnished were necessaries, yet
 if he was living with his living parent, sub potestate
parentis, he is not liable. for his parent is proper
 judge of what are necessaries. 2. Bl. R. 928.

Goods furnished to an infant in the way of his trade
 are not necessaries, Sm. J. 494. Sto. 183.

If an infant contracts for articles & dies, & his executor
 is to pay for them, he is not bound, Bro. R. 126.

Quere. Should the executor pay for them out of the infants es-
 tate, would he be liable for a discharge?

If infancy is pleaded to an instrument the considera-
 tion of which could be enquired into, a replication
 of necessaries is ba-ti denunciable. for tis said dis-
 troy the privilege of infants, in not being bound for
 more than the value of the thing received.

2nd If the deft pleads infancy, the plff may reply a
 promise after full age - this sets up the original cont.
 for the courts of infants may be ratified ^{generally} voidable

If the deft in his rejoinder traverses the fact, that
 he made a promise after full age, or that he made
 any promise at all, he must prove that he did not
 promise after full age. the plff must prove only that the
 deft promised. 1. P. R. 648.

But such a replication of a promise after full age, can
 be made to a plea of infancy in an action on a cont-
 strictly void - But J. R. thinks an action will lie on
 the promise.

This is a defence generally in all courts - as to first courts the L. has in some measure been altered so as to make them liable in some cases.

She can convey her bond with her bond with her H.

If the H. is with her to a good defence to bonds - so also if tis done by his command - in those cases she cant be injured.

Different from the L. generally - as it respects M. & S. they can be united in an action on bond. see Ch. & Adg. A. & H.

Stat of Limitations.

The principle of this stat seems to have been mis conceived - tis not edg from the elementary writers to collect it. We shall now treat of it as it respects courts only.

If a man undertakes to pay money for any goods he purchased the stat runs upon it.

If a man pays a sum of money on a note, or more than 6 years standing, it takes it out of the stat. What then is the principle? Tis sd that length of time always creates a presumption, that twas paid. The Legislature then have only then disburthened the jury & reduced an uncertainty to a certainty to a certainty by specifying the time, when the presumption shall commence.

We will now consider the case of a bond in Eng. L.

231.

Actions on bonds
Here a man of large fortune gives a bond of 50[£] to a neighbour - after 20 years the man who held the bond dies - prior to his decease his circumstances were embarrassed - he borrowed money respectively from the obligor - the executor finds the bond, presents it to the obligor, who acknowledges he gave it, from the circumstance of its being his hand writing, but says it must have been paid & paid in over the length of time & other circumstances - this a good plea in bar at G. B.

Now this stat says if your note has been left there 6 years, is not paid - if more, it has - the stat fixes the precise time when this presumption begins - any proof that will rebut this presumption takes it out of the stat. If a man acknowledges he owes a debt barred by the stat & says no more, it takes it out of the stat - if he pays a part this takes it out - & it runs from the time he last acknowledged or paid.

A claims of B that he owes him a sum of money - & B says "I know it will never pay you tis barred by the stat" - A can't recover. B acknowledges the debt but stands by the stat.

Again A calls on B for a debt ^{of 3[£]} barred by the stat. - B says the sum is too much I will pay you 5[£]. A supposing he had an acknowledgment of the whole debt brought an action for the whole sum - there was no recovery - he might have recovered the whole sum.

A man makes a will & directs his executor to pay all his debts - now the executor will direct him to pay all debt barred by the stat - tis not to be the in-

tion here that governs - but it is not so - is a
warranty of the state.

A man becomes a bankrupt & is discharged by
L - he afterwards publishes, that he will pay all his
debts - he must have a debt barred by stat - this is
on the above mentioned ground - to discharge a debt
in conscience tho not in L

Whoever promises to pay a debt barred by the stat
must pay it.

A owes B a sum of money & dies - B met the executor
& told him of it, saying it was barred by the stat -
the executor told him to prove the debt & he would
pay it - this takes it out of the stat - & when proved
he must pay it.

If a man promises to pay a sum subsequent to
the commencement of a suit, it takes it out of the stat.

Pldg: The stat must be pleaded - if the debt is paid
full paid or any thing else, he waives the stat.

A wrote petitioned that a commission of bankruptcy
might issue as a debtor - it issued & he was declared a
bankrupt. Afterwards some of the other creditors petitioned
that it might be set aside, on the ground that
the persons named who petitioned for the commission
were barred by the stat - The chancellor refused on
the ground that the debtor waived the stat, in per-
mitting the first petition to be made

An endorsement bona fide takes it out of the stat
- you must however prove that the debtor assented
to the endorsement, or knew it, or paid the money

Actions on bonds

on there would be a door open for fraud. In ²³⁸
 the decisions in the superior & Ct of errors have
 been extremely contradictory on this subject. Bur. 1099
Bro. & 41. Pr. Ch. 385. S. Mod. 526. Bart. 421. 2. Vent. 192. 180 191.
1. Falk. 29. Bro. & 160. 981. Bur. 2624, & a case in the old &
 of evd under the head of apt.

This state commences its operation when the 1st night of ashore arrives unless in otherwise expressly provided.

The Board yeems have an action upon an express prom.
iss; & as to those implied by L.

The stat ceases ^{in its} effect on the bringing an action
- & if after judgment is obtained on a writ of course,
for some defect in the proceedings, the party may
revive his claim in another action on the writs.
- this arises from an equitable construction of the
stat.

Some persons are excepted from this stat. from accidents, infants, & persons beyond sea - but these persons must bring their actions in 5 years from the time that its disability is removed.

But where the stat has begun to run before the
intervening disability it shall continue its opera-
tion

Since the records of the state are that no action shall be maintained & J. R. thinks his property & liability only abated - or to take advantage of it in a special plea, that amounts to a bar - as now aff. infra
vix annos.

The imperscriptibility of this Pledge the Judge thinks desirable.

Suppose there is a bond to be executed in N. Y. when upon such an instrument no state can sue it is sued in bar. where it is barred in 18 years. & Judge is rendered for the debt in bar. on the state being plead in bar. now as the law does is to govern & judge take the cost a recovery can at any time be had in N. Y. where it was made.

Yet how can this consistently be done, since the action has once been barred? for a judgment rendered for the debt in this state on a plea in bar, must be conclusive in an action for the same cause brought in any other state.

Book Debt.

If a part of a book debt is barred & a part is not, by the state, & there is a judgment made, it shall apply to that part which is barred unless there is some particular application of the money. S. C. A. 189.

Forfeits.

If the cause of action occurs immediately upon the act done, the stat may be a bar - but if the cause of action arises by means of special damage, the stat won't attach, as in the case of slander, by words not in themselves actionable but made so by special damage arising from them - but in this case I imagine the stat attaches as soon as the damage is sustained, by reason of a R. just mentioned. It has been a question in these cases of loss, whether the stat runs in the cause of action or in the form of action - as if a stat enacts that no action of trespass shall be brought after 3 years - now may trespass be brought after that time for the same thing - J.R. thinks that were this a new question, neither time nor trespass would lie - but on the principle of construing statutes, that abridge the S.L. strictly, the ct. have said that trespass would lie in this case.

Durep.

This a good defence to counts in all cases, let them be ever so righteous.

In an action of ass't durep may be given in ev't under the G. issue - but to an action on a specialty it must be pleaded in bar, & the dftt must state in what particulars the durep consisted. Peake. 602. 85.
2. Bl. R. 759. 825. 9. Will. 240. 304.

Idiocy.

In bar. we have a different R. from the b. & v. v. Any thing may be given in evd. under the lg. issue to defeat the suit except the act of the dft. himself. Consequently barney idiocy &c. would be a good plea in bar under the lg. issue in a ct. of b.

By the b. & v. application must be made to chg. to get a commission &c. see cont.

Foreign Attaché.

This defence was unknown to the b. & v. except by the custom of London. The b. on this subject depends upon the custom of each particular state. The defence is in this way, that by a writ of foreign attachment the dft. has paid the debt off his note, to the plffs note, to answer an original debt between the plff & his note. Suppose A owes B 1000 £. & A absconds leaving note in the hands of C - B gets a writ for A, (but knows at the same time that B. has note of A to the amount of 1000£) of foreign attaché & leaves a copy with C. charging him with being factor agent or trustee for A, or as we say factotum him - then if judgment is recovered in the absconding debtor, & the garnishee refuses to pay the money, a scire facias will issue vs him & bring him into ct, & put him under oath concerning the note he has of A. - and C. must be allowed to testify tho' the plff doubt wish it, & he can prove the facts by other evd. - C. is a competent witness.

The R. is, the Garnishee is never to be put into a worse situation than he would have been had his

note not run away, except the trouble of proving that he was factored & did pay the debt, which is to be done if sued by the note.

If he is to pay the debt in any collateral article, as boots & shoes, he can be compelled to pay the money when factored.

This writ ^{can} issue for torts, as whipping staves & ~~baton~~ upon judge for torts - it then becomes debt & you can factorise for any thing but debts.

Composition with Notes.

A man who is bankrupt may make a composition with his notes, & it bars a recovery of the remainder.

If any agreement is entered into by notes different from another is void. As if A. B. & C. meet & agree to accept from B. 10 shillings on the pound & I secretly receive a note for the full amount - this is void on the ground that it defeats the other notes.

Illegality.

If there is any illegality in the note no matter from what it arises, is a good defence - the only difficulty is to get at it.

If the whole note is set forth twill appear on the face of it, whether it is illegal or not - but in the case

of a bond too difficult to come at the consideration as it can't be set forth either by the plff or deft.

But you may always attack in the future & know its illegality, tho it don't appear on the face of it.

It was with the greatest reluctance that it is adopted this practice - yet it never was doubted but that money might be pleaded, tho the l^y doctrine on which it was founded was admitted to be b.
3. Wills. 341.

Fully accounted.

The parties usually sign a writing or article of settlement - hence this is a good bar.

Merger.

This is where there is a bond when aft^r is brought

In some cases where the bond is only a collateral act or security, it can't be pleaded in bar.

But in some cases, as where there is a sum of money due & a bond is given it can't be pleaded in bar to an action for the money.

Former judgt.

It must be a judgt on the merits, & not for mere formality - as a defect in the debt.

When in the original action there is not substance for the debt, tis in fact on the merits & will be a bar - you can't change the form of the action & bring another.

In case of the concurrent actions of *traverse* & *traverse* you can't bring 1 after another.

The 2^d R. is if in the second action you are obliged to bring the same kind of ev^d to support it as in the first, the first is a bar to it.

Discharge.

Technically this means throwing up a bargain before a right of action has accrued.

But suppose they don't throw up the bargain till the right of action accrues - tis of no avail - there must in such case be a release - i.e. a discharge after right of action accrued. Brs. B. 384, 1 Sid. 177. 273.
2. Mod. 44. 1. Do. 205.

Payt.

By B. L. this could not be pleaded to a bond - it may now by stat. - It must be in kind the accord must be *plead*. If you are sued upon covenant broken *plead* generally, that you have kept your covenant. When a bond is given to save harmless & you are sued upon it, *plead non damnificatus*. If the count involves principles of L. the *quo modo* must be set out - but if tis mere matter of fact, you may only say you have performed.

Release.

A release in writing, need not now be sealed. A sealed release attested with consideration is commonly called a discharged. In a written one, a consideration must appear, as to a modern factum. If it is sealed you need not state the consideration - the seal implies one.

If the instrument declares the consideration & it appears to be bad, the release is not good - the seal only furnishes presumption of a good consideration, which is thus removed.

The best & most comprehensive words in a release are "all demands & all claims."

If, at the time of the release there is debt not due, it is discharged. Bro J. 300. 6 Litt. 290.

Suppose a man leases a farm for 100 £ per annum a release of all claims don't include the rent to grow afterwards - because the enjoyment creates the rent. Bro 2606. Bro J. 487. 1 Sid 141. Salk. 578.

There is another set on which a release won't operate viz. covenants not broken - as a covenant to repair a house - this is not discharged by a release as there is nothing in eff. to be discharged. Bro J. 170.

But still a discharge of all covenants will reach them. Bro J. 170. 60 Litt. 291.

Covenant.

Covenants cove. & agreements & are often used as synonymous terms, tho they clearly are not so. Cove. is a general term & includes all kinds of agreements. Tho is cove. synonymous with agreement. agreement denotes all covenants.

A Cove. is a cove. written & sealed - hence tis no proper proper expression to say a parol cove. tho tis sometimes used in the books.

This written cove. may be by indenture or in deed
 1. Cow. B. 244. 1. Ba. 526. 1. A. R. 340.

But tho a cove. is by & indenture tis sufficient to support an action on the covenant, if he sealed it whether the covenantee sealed it or not. 1. Cow. B. 212. 1. Ba. 266.

The usual remedy for a breach of cove. is an action at L. for the recovery of damages. Where the damages are reduced to a certainty, debt will lie upon the cove. as well as upon a single bill. So if A cove. wants to pay B. 100. £ on the event of a string debt will lie to recover it. So an action of debt will lie for a penalty, tho tis in a cove. as well as if it was in abondn - but where the damages are uncertain debt must lie. 1. Ba. 1087. 1. A. R. 167.

But where a cove. is to do some specific act as to make a conveyance, the most proper remedy for a breach of it, is in chry. for a specific performance I don't mean that an action at L. must lie, for tis a L. 4. that you can't obtain relief in chry, unless you can recover damages at L. 1. 1. Ba. 27. 1. A. R. 156.

Where a party can obtain adequate relief in Ct. of L. he cannot resort to chry. - but if he cannot at L. he may go to chry. Damages must be ascertained in Ct. of L. & not in chry. - this is the business of a jury. 1. P. W. 570, 510. 1. Br. 84. 341. 1. Tent. 279, 192.

Even in these latter cases where damages only can be recovered, if the relief prayed be consequential or collateral, to a ground of relief, properly cognizable in chry the bill will be retained - Hence if a matter of fraud is mixed with the damages, ~~etc~~ may retain the bill the relief lies in damages only. Thus A sues B in con. broken at L. B files a bill in chry for an injunction on the suit on the ground of fraud - A may now file his ~~cross~~ bill in ~~etc~~ for the breach of the con. & if no fraud is found, chry will give damages - & the complainant will have his relief by a ~~of~~ of damages - & in Eng. as often at L. may be directed, to ascertain the amount of damages. 2. Pow. L. 216, 1. Eq. Bar. Ab. 17. 1. Ba. 69. 526.

Bonds are of 2 kinds - cov. in deed & cov. in L. A cov. indeed is an express cov. i.e. an express cov. written expressly for the parties. 4 Co. 30.

Bonds in L. are such as are raised or implied by L. - they are the implied cov. Thus if A demises land to B for a certain time, the L. raises a cov. that B shall quietly enjoy it during that time. & also that the lessor had a right to make the lease. Inst. 383. Co. D. 266.

There is no cov. in time - it rises from the nature & form of the agreement.

Cov., are real or real - A real cov. is 1 by which a person binds himself to pass or things, real or lands, or tenements. Thus a cov. of seisin in bargain & sale is a real cov. - & so is a cov. of warranty. 1 Inst. 139. Co. l. 294. T. N. B. 243.

A personal cov. is when the agree is annexed to the person, or concerns the personally. As if A covenants to do work for B. or pay money, or build a house. If the subject matter is real, the cov. is real - if personal the cov. is personal. 5. Co. l. 16. 17. T. N. B. 48.

To make an express cov. no precise form of words is necessary, any words shewing a concurrence of the parties in the agree are sufficient - hence neither the word cov. nor agree need be used - it may be a promise. Thus if A leases to B surving a chamber & apomage to it - now this is a cov. on the part of B - the lease that the lessee shall have the license to it therefore tis a safe & that any words importing an agree being a sealed instrument, may amount to a cov. Bur 290. 1. Roll. 918. 2. Mod. 86. 1. Cent. 10.

If A leases land to B & in the lease there are these expressions "reserving so much rent" or "B paying so much rent" & B accepts it, tis an express cov. on his part to pay rent, & if he do not an action will lie on this. The deed may, by poll or indemnity. 1 Inst. 11. Bur. 2. 202. 69. 1. Inst. 141. 1. Cent. 375.

A cov. may be concerning something present past or future - generally is future but not always - So of past - a man may bind himself that he has done something -

Cov. of seisin of the present kind - cov. of warranty is of the future, Flow. born. 308^a

bonds in L. differ from covs in deed in this - covs in deed are founded upon the words & in the deed. bonds in L. are not implied from the words used, but from the nature of the cov. or against itself 3. 60. 80. 1. Do. 17. Barth. 98. Dyer. 257. Palmer. 988. 2. Mod. 92.

All covs in L. may be set aside by an express cov. in deed. 1. G. 178. 2. G. 268. 273.

A cov. for quiet enjoyment does not extend to the tortious ejectment of a stranger - because the lessee may have his action in the stranger for this.

But if the lessee be ejected by the lessor himself, the lessee may have an action for cov. broken. Bro. 214. 4. 60. 86.

A recital in a deed of a former agreement creates a cov. Thus if in a deed between A & B be said "that whereas it has been agreed upon between A & B. or whereas it has been heretofore agreed upon that A shall pay B a sum of money &c. - now this recital creates a cov. for this recital confirms the original agreement. 9. Hel. 465. 1. Leon. 122.

The technical words are not necessary to constitute a recital or. yet there must be words which import an agreement to constitute a cov.

Hence in a lease where the lessee covenants to repair during the term, provided the lessor will furnish the timber - now this proviso is a condition precedent to the lessee's obligation to repair. This proviso is not a cov. that will bind the lessor. If however it had been thus - be provided & agreed that the lessor furnish timber - this would be a cov. & bind the lessor - here would be an agreement. 1. Roll. a. 318. 2. Barn. D. 560. 3. G. 267.

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But by this tis not meant that a cov. can't be created in the form of a proviso - for it may be created in any form, if an intent to be bound is manifested. Thus where a lease was made for 50 years provided the lessee died within 20 years - his ex'r shall have the lease for the remaining time - this is a cov. 1. Co. 155. 1. Roll. 518. Moor 478. Ray 27.

If the party to a deed executes a bond conditional, for the performance of cov.s contained in it, this extends both to cov.s in deed & in l. Thus A leases to B by words dedi & concepit, which imply a two fold cov. & then executes a bond to perform these cov.s. this bond extends to both. 4. Co. 80.

But whenever a stipulation is in the nature of a defeasance it don't amount to cov. in l. Thus A coven to pay B 100 \$ by a certain time on condition - provided B does a certain act before that time - now this is not a cov. to bind B - tis a mere defeasance. 1. Roll. 518. 1. Sid. 48. 2. Barn D. 560.

Construction of Bonds.

In a G. R. that cov.s are to be construed liberally according to the true intent of the parties - & not strictly as is the case in grants executed. Row. 140. 1. Inst. 45.
1. Co. 599.

Hence it is that often a literal performance of a covenant secures a covenant as an action - for it may not be the true intent of the parties - So where A covenanted to deliver up a horse to B. which he did as soon as a certain day - but before that time he used the horse & collected it, & at the day appointed

delivered it up - then he was liable for a breach of cov. because it was not the intention of the parties that it should be used. Bro. 27. 1. Sid. 48. Exp. 8. 570.

On the other hand when the covenantor does all that was intended to be done he is deemed to have done all - the in fact is not a literal performance.
2. Leon. 62.

So on a cov. to leave his timber on the land - the covenantor cuts it all down & leaves it - this is a breach. Exp. 271. 1. H. Bl. 276.

A cov. to deliver a piece of cloth to B - he cuts it to pieces & then delivers it. cov. broken. 1. Ba. 429, 442.

So when the debt a farmer, cov. that the ptt shall have his grains, & then spoils them - cov. is broken. Star. 39.

This question has arisen as to construction - viz - whether 50 pounds avoirdupois weight in a collateral article was what was meant by 50 £ - decided that it meant money - 1. Sid. 151.

Another R is, that when the words are ambiguous they shall be taken, most strongly for the covenantor & most beneficially for the covenantee - this R. applies to all covenants, executed as well as executory.

Thus when the debt cov. to pay the ptt 50 £ per annum, if he would marry his daughter & limit no more - here it was holden that the covenantor should pay during the life of the covenantee. 1. Bro. 102. 1. Sid. 101. Exp. 8. 271. 1. Ba. 522.

In some cases, an exception will amount to a cov.
- & in some it won't - the distinction is very important. The R is when the lease is of a certain subject except a certain part of the subject, this exception is not a cov. So a lease of a manor except a certain vol is no cov. by the lease, that he must enter & occupy the land.

But on the other hand when the exception is of some thing, or some things, or some profit to be denied out of the thing demised, tis a cov. Thus A leases to B a farm of land except a right to pass over it. i. e. a right of way - now this is a cov. A won't disturb it while passing over it. A leases a house to B except a room & passage to go to it - now this right of passage is a cov. - for tis a thing denied out of the thing demised. Bro. & 667. 1. Roll 491. 1. Ba. 591. Barth. 232. Salk. 196. 11. Mod. 170. 1. Pow. 6. 238.

There is an important distinction between the construction of express & implied covenants. express covenants are construed more strictly than implied. Thus when I expressly contract to perform a voyage by a certain time, he shall be liable upon this cov. even tho he was prevented by causes uncontrollable by him - as by a tempest &c. Bur. 1632. 7. Bart. 294. 2. S.R. 259.

But suppose he had given a penal bond conditional that he would go the voyage by a certain time, & he should be prevented by unavoidable casualty - he would not be liable to the penalty because there was no express agreement.

The maxim that no one shall be liable for a loss occasioned by the act of God, applies only in those cases when the L. makes the covenant.

If 1 person cov. to pay rent for a house during a term of time, & the house is destroyed, still the lessee must pay rent for the whole time he covenanted to do. 269, 1. d. Ray. 1677, 1. C. R. 310. 704, 1. Fort. 966. Dyer. 39.

But in case of implied cov., inevitable accident will excuse the covenantor. A tenant for life or years impliedly cov. that he won't commit waste. now if losses should be occasioned by an act of God, or an inevitable accident, as by a trespass, he is excused.

An express cov. is intended by the parties, that the covenantor shall become insured at all events - see in implied cov. 1. Fort. 966. Doug. 289.

The J. R. is, that the performance of an express cov. is not discharged by any collateral matter - thus a man undertakes to go a voyage & is prevented by stress of weather - this is no excuse.

But there are exceptions 1st If 1 cov. to do a thing which at the making of the cov. was lawful, but which by a subsequent stat is made unlawful, the covenantor is discharged & the cov. will be annulled. Salk. 198.

Concerning this R. a question has been suggested - can this R. exist under the constitution of the U. S. which says "no L. shall be enacted which shall impair a contr. Mr. J. thinks this don't affect the R. of the C. L. - for it don't operate immediately on the contr. - tis simply a R. of public policy not relating ^{in its terms} to any contr. which may have been made. it don't impair the obligation of a contr.

2^d If 1 cov. not to do a thing which a subsequent

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stat. makes it his duty to do, the cov. is annulled. Thus if A should enter into a cov. with B to serve him 10 years, & agree not to leave his service during that time, & a subsequent stat should require all young men to go into the service of their country the cov. would be cancelled

A cov. to do an unlawful act, is in judgt. of L. the same as a cov. to do an impossible act. 1. Salk. 198.

But cov. not to do an unlawful act is not annulled by a subsequent stat making the act lawful. 1. Salk. 198.

The L. R. is that covs are confined in their operations to the subject matter of that which is in being at the time of executing the cov.

Suppose the lessee covs to pay the taxes on the demised premises - now this extends only to such taxes as are in being, at the time of executing the cov. & not to those of a different kind that may be created afterwards. So if a man covs that there is only a land tax when the cov. is executed, & afterwards a tax is laid on malt. the lessee is not bound to pay this tax. 1. Lev. 68. 1. Hut. 222. Str. 1191. 3. P. R. 377.

A cov. contrary to L. & good policy is void. & so of all covenants, Bur. 2225. 9. P. R. 17. Barf. 341. 429. 1. Bur. 8. 166. 176.

As to the R. that the performance of an express cov. is not discharged by any collateral matter. It has been made a question when a lessee has covenanted to pay absolutely to pay rent for a certain time & the house is destroyed before the term is out, whether the lessee can be relieved in a set off chcy. 1. Bh. ca. 83. Ambl. 619. Unsettled by any authy. 1. Foul. 366. to 371.

Stout. gives an opinion in this decision & Mr. J. coincides with him - tis a settled maxim that a ct of eqty cant controul a ct of L. - A ct of L. cant sustain every circumstance that eqty can - but these things must be mere matters of eqty. This however is not 1 of those cases - the party must pay - When eqty is equal, the L. must prevail.

This doubt at first appears equal - but Mr. J. thinks it is - tis the lessee during the term - he only loses the use - whereas the lessor loses the freehold.

It is clearly the intention of the parties that the lessee pay at all events - this is the construction in L. of L. & eqty cant velum, unless it can make a court for the parties.

If one leases a free chattel & cov. that the lessee shall have the use of it during the time, & within that time it becomes useless for want of repair - the cov. is not broken - tis not the duty of the lessor but of the lessee to repair. 1 Ba. 591. 1. Hutt. 2644. 1. Sid. 429. 1. Term. 921.

An assignt of a chose in action if tis by deed, amounts to a cov. by the assignor. that the assignee shall have the benefit of it.

If then the assignor receives the money or releases the obligor. he is liable on this account to the assignee. Ed. Ray 688. Salk 125. 2 O W 608. 1. Mod. 113. 1. Pow. 6. 170 as D.

By this is not meant that choses are negotiable at L. & for they are not - but that the cov. in this case binds the covenantor. In Cov. tis usual to see the covenantor for fraud, for receiving the money & giving a release.

If by the custom to sue him on the cov. & if the assignee is a bankrupt, the assignor may go on the obligor for recovering the release in chancery.

An assignee of a chose in action, need not be by deed or in writing - for in eqty a parcel assignee will be protected, tho' tis not a cov. but a sale. 4 R. 670.

A promise to pay the assignee in consideration that he will forbear, will bind the obligor, notwithstanding he obtains a release from the obligor. 1 Root. 108.

A cov. by a covenantee not to sue his debtor within a certain time, is no bar to an action brought within that time - but the covenantee by suing makes himself liable on the cov. Bro. 392. 3 Lev. 41. 1 Shors. 46 4. Ba. 265. 1 Cr. 8. 699.

The reason of the R. is, if twas considered a temporary release or bar, it must be perpetual - for a final action once suspended is gone forever. 2 H. Bl. 10. note. 1 Lev. 41. Hob. 10. Salk 599. Benth. 63. 2 Cow. 6255. Ed. Ray. 187. 399. 419.

But if such a cov. makes part of the instrument sued upon, as if tis endorsed on the back of it, it prevents a right of action till the time expires - but still tis not in the nature of a bar - the true ground is that the cov. is a part or parcel of the instrum^t - & thus must be taken into view in construing it - tis the same as if incorporated in the body of it.

The above R. applies only to final actions - a temporary suspension of a right to a reallty is not an extinguishment of it. 2 R. 6. 483. 6 D. 697. 1 Lev. 152. 4. Mod. 679. Ed. Ray. 690. Exp. 606. 2 H. Bl. 4.

A cov. by a covenantee never to sue his debtor is a perpetual

bar - it operates as a release, & may be pleaded as such.
3 J. R. 170, 446. 1. Mo. 29, 2. Bul. 95, 290. 4. Root. 95. Bro. 8. 352.
1. J. R. 446. 1. Roll. 999.

The object of this R. is to prevent the multiplying of suits which would inevitably produce the same effect - for if the ente should recover he would be compelled to refund the whole. Bro. 8. 352. 3. J. R. 170, 1. Do. 446.

A cov. by any person who has a legal claim in another, not to prosecute the claim at a Ct of particular jurisdiction, which has cognizance of it is void - tis a principle of E. L. that all shall go to the Cts of justice established for that purpose.

But a cov. by a foreigner, with a foreign master of a foreign ship, not to sue the M. in any other than their own country, is a good bar to an action brought by him in the M. 2. H. Bb. 609. 171. 9. Salk. 298. Ld. Ray. 690.
11. Mod. 254. Com. R. 1363.

A cov. not to sue at all of 2 joint & several obligors, is ^{not} bar to the other. 3. J. R. 168. 1. Root. 74. Ld. Ray. 690.
11. Mod. 254. Kirley. 44.

But suppose the obligation is joint, & there is a cov. not to sue 1 of them - here I think the debt is liquidated - this is a good plea in bar - no action can be maintained - 1. Saunders. 291. Babell vs. Vaughan, & others therein cited.

If I grants to his debtor that he shant be sued before a certain day, & he is, he may shew this instrument as an acquittance - tis a conditional release - tis different from a cov. tis in the nature of a defeasance - tis a conditional release. 1. Roll. 939. 4. Ro. 266. Barth. 64. 210. Bonel. 129. Host. 619. 2. Show. 446. 1. Do. 46. 290. 350.

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There are certain covs. used in conveyances or b. conveyances, which need particular attention. In all deeds of conveyance except quit claims, there are 2 covs. ^{1st} that the grantor has a right to convey.

If the conveyance is a freehold tis a cov. of seisin if tis less than a freehold, tis a cov. that the grantor has title.

2nd. Cov. here called a cov. of warranty - in Eng a cov. of quiet enjoyment.

These three covs. may be express they may be implied from words, deeds & concepts. 4. Co. 80^l 2 Mod 92 1 Roll 517 520 Dyer 257. Bp. 266. 7. 8.

A quit claim deed or release is a cov. in any claim or title of the lifeor.

In a cov. of seisin the grantee may sue as soon as the deed is delivered - for if the grantor is ^{not} well seised - tis broken the moment the deed is delivered. Herby. 3. 9 Co. 60. Bp. 299. Bro. 9. 367. 370.

But a cov. of warranty the grantee cant sue till he has been evicted - this cov. cant be broken till he has lost his possn. Bp. 901. 2. Bro. 6. 917.

In an action on cov. of seisin tis enough to state that the grantor was not seised - tis unnecessary to state who was - see formerly. 11 Supra. 2. Root. 14.

After the grantee has alleged the grantor was not seised, tis incumbent on the grantor to show he was seised. Bro. 9. 369. 170. 9 Co. 60. Bp. 299.

Gov. of seisin is broken by an existing incumbrance on the land, unless it is excepted. 3. East. 491. S. 66 of N.Y. Sandford vs Washburn.

See 7 John.

The grantee in case of a cov. of warranty, must allege an existing & that he is under claim of title & also that the eviction was under good & elder title - the latter branch is indispensable. 4. Bo. 80th 1. Mod. 292. 4. T.R. 617. Bro. 315. 1. H. Bl. 26 or 26. 277. 1. Sid. 466. 2. Lamond. 177.

It has been decided however that when it appears on the face of the dectee, that the eviction of the p^lty was under title, it is good tho there is no formal dectee of it. Exp. 302. 2. Geo. 92. 4. T.R. 607. 2. T.R. 278.

But it is unnecessary to state what that elder title was, or in what manner he came by it, or under what title the evictor claimed, 2. Lamond. 177. 2. Geo. 92. 1. Sid. 466. 4. T.R. 614.

Gov. of warranty don't extend to the tortious acts of another - therefore it is unnecessary to state that the eviction was under claim of title by the party evicting 4. T.R. 419. Str. 404. Exp. 279. Holt. 34. 3. T.R. 584. 2. Shaw 245.

It is insufficient for the p^lty to allege that he was evicted by written process of C. for there may have been collusion between the parties. Bro. 897. 4. Bo. 80th.

But one may if he pleases expressly cov. in the tortious acts of a third person, & in such case there is no need of stating eviction. Exp. D. 279. 4.

Tho the general cov. of warranty don't extend to the tortious acts of strangers, yet a cov. of warranty in the acts of particular persons, extends even to tortious

eviction by them. Holt. 95. 1. Roll. 491. Str. 400. Cro. E. 212.
Exp. 274.

If the warrantor disturbs the grantee, ev. by a
tortious act under claim of title, he is liable on the
cov. & the p^{ty} need not state that the def^t had any
title, or even that he claimed any - if the act affirm
shows the def^t to be an assertion of right. 1. S. R. 671.
1. Roll. R. 21. Exp. 302. 279. 2. Shaw. 445.

The heirs, execs &c of the grantor are included in
the cov. of warranty. Exp. 302. 2. Bom. D. 564. Dyer. 257.
1. Roll. R. 20.

Eviction by the lessor suspends the rent - secus if a
mere trespassing act. Barf. 262.

It has been sd that a cov by an exor as such is to
quiet enjoyt, tho it is in terms vs all persons in the
construction only vs himself & those claiming under
him 1. A. R. 35. Shep. T. stone. 169.

I don't see how this exor can be taken out of the C. R.

In Eng. upon cov. of seisin recovers the consideration
& the interest - as to the R of damages in case of war-
ranty no R is adopted in Eng. I suppose however it
would be the actual damage.

But L on this subject is different from theirs - see
Keyl. 7. 2. Roll. 46. 274. 1. R. 154. 1. R. 155. Exp. 274.

Another difference between them L. & ours - On a cov. of seisin
the assignee of the grantee, can maintain an action vs
the first grantor - the reason is the cov. of seisin is broken
the first moment of the execution when the grantor had

Actions on Bonds

In notes bonds & all contracts for the payment of money, ^{217.} frequently stipulated to pay the money by instalments

This subject is treated very confusedly in the books - the answers from various causes - one is the books make no difference, between different forms of contracts as bonds bills &c.

1. On a bond with condition for payment of an aggregate sum at different times, debt will lie for the first breach - i.e. part non-payment. This R. is laid down directly contrary by Lord Coke, in Bo. Lett & in his reports - The R. laid down by Coke appears only to single bills. 1 Act. 1119 Mills. 80. Str. 918. 815. B. N. P. 168.

But if single bill is so given there is no action, till the last payment is due. 1 Inst. 42. 10 Co. 128. 1 H. 3 548. B. N. P. 168.

Now the difference is manifest - In a single bill the debt is an entire indivisible debt - but in a penal bond, by non performance of the condition, the whole penalty is forfeited at L. L. But in law, by stat. only what is due can be recovered on a bond.

Rest may be sued for when a part is payable whether it be by a single bill or otherwise.

It differs from a single bill - in that there is nothing due till after the expiration of the first quarter - It is to give from the profits - debtum in presentia, solvendum in futuro. 10 Co. 128. 9 Co. 12.

Bonds & promissory notes fall under a different R. If one contracts to pay an aggregate sum by instalments, an action of assumpsit will lie when the first is payable due - but debt won't lie upon the contract till the last is due

The R. is the same as to promissory notes. Bro. & 118. contra. Bro. & 175. 9 Co 22. 1 H. Bl. 592. Chitty. 212. B. & P. 167. Bro. & 776. 807. Salt. 165.

There is a difference between a cont. to pay an aggregate sum by installments, & a cont. to pay a sum by installts without any aggregate sum. In the latter case there are 2 or more distinct debts consequently debt will lie. When is no aggregate sum in the case an action will lie to recover the installts, as they become due. 1 H. Bl. 590. Bro. & 118. 776. 807. B. & P. 168.

When a sum is payable by installts. with a clause, that on non payt of 1, the whole shall become due, the clause is good. Chitty. 212.

This is not in the nature of an unanimous consideration. Chitty. 212. Bro. & 505.

You will see that when a cov. is to pay money by installts there may be a number of breaches. Now is a R of pldy. that in an action of cov. broken, the plff may allege as many breaches as there have been.

But in case of penal bonds the R. is the reverse - he can allege only 1 breach on the principles of the B. & P. - because 1 breach works a forfeiture of the whole penalty - more than 1. there would be duplicity. 2. Inst. 199. Combl. 297. 3. Salt. 108. 2. Will. 293.

But 1st of pldy. as to penal bonds is the same as the English R. as to cov. for our 1st chance down the bond to the penalty actually unpaid. 2d. Bon.

In Eng. by stat of W. & M. the plff may assign as many breaches as he pleases in case of bonds as well as

cov. s. 1. Ba. 544, 2. Will. 974, 2. Al. R. 1116 1111. Bun. 820, 782. 126.

But tho at b. l. you can allege only 1 breach, yet this is matter of form & can be taken advantage of only by demurrer special. Com. 297, 4. Ba. 138.

Who are bound by Cov. s.

The first representatives of the covenantor are always implied in himself. & if he is bound, so are they. 1. Bun. Com. 128, 1. Roll. 519, 2. P. H. 197.

There is an exception to this R. where the cov. is fiduciary - thus in case of an apprentice, the master &c are not bound to teach him. Cov. C. 559, 1. Sid. 216, 1. Roll. 39 589, 2. Mod. 269.

But even where the cov. is fiduciary, there is a material difference between the duty of a first representative to perform the cov. & his liability for a non-performance by the covenantor himself - for his executors are liable. 2. Com. 269.

So also an ancestor seized in fee may at v. l. vend his heir by a cov. Thus if A seized in fee cov. s. to convey to B. & dies before conveyance is made, the heir of A may be compelled to convey to B. & the consideration money will generally goth the estate. 2. Her 219, 2. Qu. 334.

So also a real cov. will bind the heir of the covenantor, thus in the best case had B died, his heir might have compelled A to convey. B. N. P. 158, Exp. D. 215, 2. H. B. 349.

In deeds executed if the cov. runs with the land & appears designed to continue after the covenantor's death, his

Items may run upon it tho not mentioned & Dev. 22 Thin.
308. 2. 2011. 2 5612.

What cov. runs with the land.

1. The liability of the assignee on the cov. of the assignor.
 The assignee of a lease is liable for the breaches during his
 term, tho not named if the cov. runs with the land.
1. Bond. 351.

The R. is that if the thing is intended to be done,
 or the thing about which something ^{concerned} is to be done, is in
 spe when the cov. is executed, the cov. is to run
 with the land.

If the cov. runs with the land the assignee is bound
 tho not mentioned. Suppose A leases lands & buildings
 to B & B assigns the lease - now this assignee is bound
 tho not named - for the buildings are parcel of the
 thing demised, & they are in spe when the cov. is made
 so it runs with the land.

The notion of cov. that runs with the land is this -
 that the thing to be done is considered to be annexed
 to the thing demised & follows it. 5 Co. 16. 25 a. b. 4. Co. 80.
Bro. E. 582.

Also a cov. to pay rent during the term is a cov. that
 runs with the land - for the rent is peculiarly in
 - is the issue or fruit of it. Bro. 8. 382. B. N. P. 159.
1. Bond. 152. 9. 1. Roll. 821.

In the other hand a cov. to build a wall de novo, or mend
 a house on the land does not run with it & must bind
 the assignee unless he is named. This is a collateral cov.

- the wall is not in sp. - his not part of the thing demised.
1 Bo. 16. Bro. 8. 582. An. 1271. 9. A. R. 999.

So also a cov. is id to run with the land if it goes to the ref.
 port of the thing demised. But this R. supposes the thing
 to be in sp. when the cov. is executed. So if the lessee
 cov. to leave so many acres unploughed, it runs with
 the land, & will bind the assignee tho not named.
1 Bo. 17. Bro. J. 128. 2. Bro. 233. Ray. 309. 4. Kent 224. 292.

But when the assignee of the lessee is named, "an assignee"
 he must perform all covs. - those that run & those that
 don't. 1 Bo. 16. 1. Ba. 534.

But to bring a case within this R. the thing covenant
 ed to be done must be something, related or annexed to
 the thing demised. otherwise it won't bind the assignee
 tho he is named. So if the lessee cov. to build a house
 or other than the demised land, his assignee won't
 be bound tho named. This is a collateral cove. i.e. the
 act to be done is collateral & can't be assigned. 1 Bo. 16. 1.
 1. Ford 352. Bro. J. 437.

When the assignee is bound according to the distinctions
 already taken, he is so bound only for rent incurred or
 cov. broken during his posse.

If the cov. is broken by the lessee before assignee, the assignee
 is not liable for such breach - the ground of his being
 bound, when he is bound at all, is his posse, or by reason
 of privity of estate between him & the lessor. 1 Bro. 996.
 Holt. 171. Salk 199. 2. Bant. 575. An. 1271. Day. 459.

The right of action as the lessee, in the case above men-
 tioned can't be transferred. & this is a further reason why
 the assignee is not liable for the assignor's breach.

On the other hand the assignee is not liable at L. for any breach of ass. w. after he has assigned - for when he assigns, his privity of estate is lost.

Hence if the assignee assigns to a second assignee, even the very day before next becomes due, he is not liable for any part of it, for there can be no apportionment of the rent. South. 177. Doug. 799. 9. 60. 22. Salt. 81. 1. Port. 380. B. d. P. 159 or 159.

The R. is the same if the assignee is so a beggar - if he is not merely colorably an assignee.

And if he assigns before the next day, the lessor may allege fraud in the lease, & move on that ground - but this is not L. Holt. 77. 166. Str. 1221. Moul. 485. 1. O. 2022. (West. 929.

The R. is the same if the assignee assigns over to a firm or partnership. Doug. 539.

The reason of this R. is similar to that of the former one - when his estate is parted with his liability is gone - he is liable on the ground of estate tho the lease is held on the ground of ass. & estate. 9. 60. 22.

But if the assignee assigns over to a vagabond to avoid paying next, they will compel him to account for rent while he was in possession of land. 1. Port. 381. 9. 1. Str. 82. 165.

If an assignee is evicted of part of the premises demised, the next may be apportioned even in case of L. - so also an action of debt will lie on the original lease - for this grows out of privity of estate.

If the lease is evicted of a part, the lessor cannot maintain an action for ass. broken - this would lie unless the

lessee was evicted of the whole. 9. Co. 22^a, 2. East. 174.

It has been a moot question in Eng. whether a c. of chry can in any instance restrain an assignee from assigning to a volens. - tis unsettled - I think they can.
1. Post. 981. 2. Ark. 219. 144.

It was formerly doubted whether a cov. seal to assign during the term was binding on the lessee - tis settled that tis. 8. T. R. 800. 6. Rep. 803. 6. Rep. 1. 276.

If he does he is liable for cov. broken.

Under this R. it has been questioned whether the cov. was broken by the term being taken in execution by a court? Tis now settled it seems that tis not.

Tis also settled that an under lease for part of the term does break it.

It is so that tis not broken by the lessee assigning such term - for this is not an actual assign. 2. T. R. 99. 2. Rep. 80. 2. Rep. 100. 3. Will. 234. 2. Bl. R. 766.

The lessee always remains liable to the lessor, even after assign, when there is an express cov. The assignee may be discharged. The lessee is not liable in an action of debt after his assign, for his privity of estate in cov. 9. Co. 22. Salk. 199. Doug. 49. 4. T. R. 78. 100. 1. Post. 389. 1. H. Bl. 449.

The true R. is an action of debt won't lie, after the lessor has acquiesced in the assign. & consented to have the assignee his tenant. 6. Rep. 935.

But on the other hand the the assign lessor has accepted the assignee as his tenant, still if there be an express cov.

he may have an action of cov. broken as the lessee - for
 privity of soil still remains. 1. Saut. 354, Bro. J. 305. 522.
 1. Saund. 237. Bro. G. 138. 1. H. Bl. 539.

That if there is no express cov. & the cov. on the part of
 the lessee is implied by L. only, & the lessor accepts
 the assignee for his tenant, he cannot maintain any
 action as the lessee. He may, if he has not accepted
 him maintain an action of implied cov. as the ap-
 prentice.

The implied cov. is founded on privity of estate &
 cannot be destroyed by any act of the lessee with-
 out being by a consensual act of both - as accepting
 the assignee as his tenant. 1. H. Bl. 539. Bro. J. 422. 3. G. 222.

There are many other ways of accepting him - one is by
 taking rent of him. 1. H. Bl. 538.

In many cases the lessee & assignee may both be joined
 - now where this is the case the lessor may pursue
 his remedy on an express cov. as the lessee, & an action
 as the assignee, & he may obtain judgment as well - but there
 can be but one execution enforced but for covenants. If the
 lessor insists upon enforcing both executions, the party
 aggrieved may be relieved by an audita querela. Bro. J. 323.

By a stat. 32 Hen. 8. the grantee of a lessee has the same
 remedy on cov. broken that man with the land, as the
 lessor himself had at L. & by the same stat. the lessee
 has the same remedy as the lessor grantee, as he had at
 L. & as the lessor only. 1. Font. 358. 1. Just. 215. 5. Da. 379. Bro. J. 522.

But the grantee of the lessee is liable only for such breach
 as happens during the continuance of his title.

Actions on bonds

265.

There is a distinction between an assignee, & a derivative
or sub tenant. A derivative lessee is one who takes a con-
veyance of part of the residue of the term

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Pleas and Readings

Pleas and Pleadings.

Pleading is defined to be the mutual allegation into the plea & plea put into a legal form & set down in writing - i.e. the allegations are on one side & the denials on the other 3 Br. 11. 4. Ba. 1. 10. Co. 132.

All pleadings in civil actions in this country, as well as in Eng. are required to be in writing - antiently they were oral delivered viva voce, & thus minute down by the Prothonotaries - hence frequently denominated the Panels because they panel. Ut Supra.

All pleadings are now to be in the English language. After the Norman conquest they were in Norman French till the time of 36. Ed. III - thence to the R. Geo. II they were in Latin except in the time of the protectorate of Cromwell - since then they have been in English. Lawr. Pleading 29. 9. 31. 32.

The structure of pleadings are nothing more or less than setting forth such facts as constitute the ground of demand on the one side, & the defence on the other. 2 Ba. 1. 3. 5 Br. 199. Doug. 278.

Ed. Mass. says that the substantial rules of Pleading are in the strongest sense of the soundest & clearest logic Lawr. 29. Bar. 39.

The great object of Pleading is to present the claim of the plaintiff & the defence of the defendant in such a view as will most clearly admit of a just & impartial trial - & a subordinate object is to bring the pleadings to a single point & place the reasoning in the clearest & most advantageous light.

— the facts are the ground of the denials. See 912

Reading is a syllogistic process — even, good, fit, altho' new matter — & every good declaration contains the elements of a good syllogism. l. 4

Declaration in trespass quare clausura fregit. The plaintiff says, no man who enters possibly on my land I have a right to recover damages — the deft has forcibly entered — therefore I have a right to recover of 9. 3. 396

The first is the major proposition — i. e. an abstract general ^{legal} principle on which the plaintiff relies — the second is the minor proposition, containing the facts to which the legal principle is applied in this particular case — The conclusion is an inference & follows from the application of the legal principle to the matter of fact stated — The answer may be by denying any of the three propositions — & it must always be by denying one or more of them — i. e. it must either deny the legal principle or the facts or the conclusion — if he denies the legal principle then it is called a demurrer — he admits the facts to be true as stated but denies the law arising from those facts to be in the plaintiff's favour so as to enable him to recover. The minor proposition is denied by 4. an ass. issue, i. e. by issue of fact. But if both the first are admitted, the conclusion can be answered only by alleging new matter — i. e. by special plea in bar — he can't directly answer the conclusion — A release is one in something that does not appear necessary under non est habeat — This plea contains another question. What is it? Is this — if he on whose land I have trespassed release to me the trespasser, my right to recover has ceased — the plaintiff has released to me the trespasser — therefore his right to recover has ceased — then again the plaintiff may deny either of those propositions — if the first he denies — if the second, then he denies the matter of fact — if the third he must

So it is, although further here matter, in a species of
 speculation - i. e. he might show that the action was ob-
 tained by fraud - then his negligence would stand true
 - a release obtained by fraud is void - this was obtained
 by fraud - therefore this is void.

The writ.

The first stage of the writ in Eng is a mandamus
 then directed by lawful duty to the sheriff, the object
 of it being to compel the appearance of the defendant. &
 the writ is regularly commenced by issuing the writ.
 But in the King's Bench the writ is not commenced
 until a bill is filed - for there the bill is the original
 writ - the latitat being merely introductory. 7. G.
 R. 4. 3. Bl. 279. Camp. 555. 1. Bus. 45. Co. C. 677. Hawk. 275
 Cro. J. 11.

In Bon. the writ & declaration issue together - the
 writ however is the foundation of the suit - tho the
 writ is not the first stage of the suit any more than
 the declaration - But the suit is not commenced to all
 purposes till service is made - for it has been decided
 by the supreme Ct. that tender before service is made
 is good without tendering costs of suit.

In Eng the writ bears date in some town tho issued
 in vacation - but it may be proved when the writ
 did issue for some purposes - as in the case of tender
 - as to plead the stat of limitations - The suit commences
 as when the writ issues, tho not to all purposes
 till it is served - as in the case of tender above. See a
 remarkal R. that the cause of action must exist at
 the time the writ is dated - so in a writ on bond
 which is not due till the day after the writ issues.

there can be no recovery.

The first stage of pleas in the extensive sense of the word is the declaration or count. These words are synonymous when there is but one cause of action stated - but if more than one they are not so - count meaning one cause of action, declaration all the causes stated. They ought never to be used as synonymous. 60 Litt. 174 3 B. 299. Plow 87. Law 75.

Of Declarations & Counts.

The count or declaration is not an exposition of the writ, setting forth the particulars, as time passes &c.

The writ shows the cause of action, tho' not the particular particulars, which the declaration amplifies. 4 B. 8. 9 B. 299.

It in its most limited sense is caption of allegations which succeed the count or declaration - which are made for defence & support of the parties. - But its proper signification is all the proceedings, & it includes the declaration as well as the subsequent proceedings. Bar. 304. 1. Saunders. 338 n. 6. 4 B. 1.

At Ham is frequently mentioned - its use in N.Y. - & is a clause inserted in the bill of Middlesex in a writ in B. R. for the purpose of giving that it jurisdiction in actions purely civil - for originally they had cognizance of actions only committed in et contra. - but when the person of the deft is in the hands of the Marshall he may be charged in an action purely civil, & in order to get custody of him, he must state it being done by power and answer - then the writ states that he is in answer ac etiam & also in

Shading
in an action of debt.

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The next stage of the proceedings after the count is the plea - the plea must plead in answer to the declaration. 9. Bl. 291. 4. 1.6.

These pleas are the part of the plea are true facts. 1. Dilatory pleas, & 2. Pleas to the action. 9. Bl. 301. 4. Bac. 6.

1st Dilatory pleas are such as tend to delay the suit by questioning the mode of seeking redress rather than by questioning or denying the right of action itself. 9. Bl. 301. Hence if they are well founded they must destroy that action - tho not the right of action -

Dilatory Pleas have been usually divided into six kinds - but I prefer Bl.'s distribution which is into three kinds. 1st Plea to the jurisdiction of the Ct - 2nd Plea to the disability of the pty - 3. Plea in abatement - 9. Bl. 301. 4. Bac. 35.

Plea in abatement are distinct from pleas to the jurisdiction 9. Bac. 35.

The power of pty in abatement is different from that of the other three kinds - & so in the conclusions - So also is the object & effect in abatement different - to be sure they are in dilatory pleas - but they are different from the others. 4. Bac. 35.

2nd Plea to the action are answers to the merits of the cause - this goes to the merits of the pty's claim, & denies the cause of action entirely, either in point of Law or in fact. What is a denial in this case? It may be by denying the pty's right of recovery, either 1st by denying the pty's allegation either as to Law or fact, or 2nd by confessing & averring them by new matter, or 3rd by matter of stoppage - i. e. by

alleging which shows the improbability of the plaintiff making the allegations. It does not deny the truth of the allegations, or confess & avoid them - but goes to show that he is inconsistent for the plff to make the amendment respecting his right of recovery. 9. Bl. 304. 6. Lawr. 47. 5. 115. 130. 140.

As to the action and two fold at the G. issue. 2nd special plea in bar. 9. Bl. 304.

But the Defor. may deny the plff's right of recovery, give pay - viz. by demurring - this is sometimes called a plea but is not one - for tis an excuse for not pay - it may be taken to the declaration or on either part of the plff. It has not the power of a plea, nor it says the Defor. is not bound to make answer thereto. But a plea is always in answer to declaration - but this says "by your own showing you ought not to answer - so I must answer." 4. Bac. 127. 30. 1. Inst. 72. 5. Had. 199.

Demurrer has sometimes been clasped with pleas to action - this certainly is improper - for it may be in answer to any other part of plff. as well as to the declaration - indeed tis improper to call it a plea to an action - Thus far of the general division of pleas and demurrer will be treated of by itself.

4. Pleas applicable to all pleadings

In every plea two things are necessary - 1st that the matter be sufficient in L. 2nd that it be expressed according to the forms of L. & the omission or want of either of these is a defect in the plea - the former is a defect in ~~form~~ ^{substance} - the latter in substance form & form only. The former is the object of 4. Demurrer, the latter of special Demurrer. Habb. 164. Bovey 683.

The pl^{ty} is necessary to state facts, & as it may be conclusions from those facts - you state the conclusions only to show what use you intend to make, after the principles of L. when applied to particular facts - i. e. the L. arising from certain facts stated.

As I observed before is the setting forth such facts, as are ground of the claim - Defence of the parties - & the L. is to be applied to those facts by the cl - therefore the conclusions to be drawn from certain facts, do not belong to the province of the pleader -

An admission of particular L. which the cl. does not ex officio take notice - such as local customs or any particular L. - This is not to be an exception, tho' properly speaking it is not so - for tis rather stating the particular L. as matter of fact unknown to the cl. Section of Reg. 46.
S. C. R. 70.

Subordinate General Rules to improve the first.
1st Every A. should be direct & positive - not argumentative, or by way of recital - i. e. he should directly affirm the substance of the pl - As for instance in an action of debt, for the pl^{ty} to say on affidavit that he was shewn that the Debt owes him by bond &c. executed by him, is not good - for this bond is only evidence of debt which may be rebutted - but he must allege, direct & positively that he owes him an bond &c., otherwise the A. is bad.

Again suppose in the action of Treason & Commission the pl^{ty} affirms that the Def. refuses to deliver up the goods - this is mere evidence of commission & therefore is a bad plea - He should affirm positively that he had committed them - for the commission is the gist of the action - By being direct & positive is meant, that the pl^{ty} should state

in direct & positive language, not the grounds from which he intends infer, but the facts themselves - & it must not be by way of recital - the term of recital is "whenever" - ergo if he affirms & says "whenever the D^{ft} did assault & beat him" this is bad by way of recital - for the avowment is not direct & positive, & no issue can be joined upon it. 1. Inst. 322. 2. T. R. 588. Row. 128. 3. Bac. 22. 2. Do. 97. 2. Hast. 73.

But this A has received some relaxation - it has been held that the avowment following, *quia pro eo quod quidam* a *dict* & the like are sufficiently direct & positive affirmations on the part of the p^{ty}, that he has performed his part of the covenant &c. but I think it would not be a sufficient affirmation of a breach of covenant on the part of the D^{ft}. 1. Sams. 117 n. 4. 1. Lev. 175. Row 128, 6.

Another 4. R. is that the pt of each party is to be taken most strongly in the party using it - for each one is presumed to make the best of his own case - so if two constructions can be taken to the same effect, the one that makes most in the plaintiff's favor is to be taken - otherwise ambiguity would always be made use of. 1. Inst. 303. Holt. 234. 5. Bac. 2. Row. 207. 1. Ch. 176.

It is a 4. R. that each party admits as much of his adversary's allegations as he does not deny - This is a R. in all stages of the p^{ty}s. 5. Bac. 2. 33.

Another 4. R. is, in p^{ty} transmissible facts, he must regularly allege time & place - some time must always be stated - tho' it is unnecessary always to know that time stated in the Declaration - Place is necessary by way of venue in local actions - in transmissibles - for by 4. R. it could not be tried but in the same county - now tried by fiction - When time & place are not transmissible distinctly, it may be included in the 4. issue. Sams. 57. 2.

The number quantity, or price of the thing need not be stated truly, except when a mistake in these particulars would work a variance. but if it would work a variance, it must be stated. Thus suppose one declares on an ~~affidavit~~ ^{affidavit} sworn in, or in an action of debt, that the debt amounted to say an ounce 100 ^{lb} when there is but 70; here he could recover for what is stated is one thing, & what pursued another. But in an action of quantum meruit or valdebat the plaintiff need not be stated - for a misstatement in these cases could work a variance. There can be no variance in case of misstatement except in express contracts. Bar. 49.

But in actions of tort there is no variance, for the evidence must support the declaration. Bar. 49.

Another G. R. is that every mispleading does vitiate the plea - but repugnancy does vitiate all proceedings - see in caption hereafter under title of plea in law. It must necessarily mention that mispleading, is something wholly foreign or unnecessary - repugnancy is such contradiction, that one part of his own plea contradicts and destroys the other. 3 Bar. 4. 1. Inst. 309. 4 Co. 52. South. 288. 2.

It is so in some books that every thing must be pleaded according to the legal operation, & not according to the strict fact - so if one joint tenant seizes another co-tenant, this must be pleaded as a release, for he can't seize him he being already seized - so if granted by tenant for life the mansioner in fee, this must be pleaded as a surrender, for he can't grant - so if one commits ^{to} not ^{to} see his detainer it must be pleaded as a release.

This R. however is not correct as it stands, tho' it is the most legal mode of plea. Yet it may be & there is no impropriety in plea according to the strict facts - the R. therefore ought to be it may be pleaded as a release -

not it must be. 2 Bl. R. 11. 1. Inst. 192. 2. 4. 1. Co. Ray 440.
1. Bac. 104. 265. 1 L. R. 446.

That which appears on record need not be pleaded. 1. Inst. 303.
2. Co. 40. 11. Co. 45. 2. Inst. 247.

All necessary circumstances implied in facts stated
need not be alleged specially - thus in *plea* of *assumpsit* one
need not state, that *he* was *living* at *the* time. *Assumpsit*
ex in terminis imply *living* - yet there are many and
our cases which seem to imply, that it is not good or
denumer - but these are not judicial decisions - they
seem to have been dropped without replication. 1. Inst.
309. 2. Co. 44. 2. Co. 40. (Row. 65. 41.

A *plea* in *free* *simple* may be alleged generally
- but a particular *plea* must be stated specially - for a *plea*
plea may be acquired by other ~~ways~~ ^{ways} those legal modes
as by *forfeiture* *possession* - but a particular *plea* must.
Co. Ray 339. *Law* 37.

Impertinent answers never require proof - immate-
rial answers as contraverting distinguished from impertinent
must be proved sometimes (tho not always) specially -
- an impertinent answer is a mere *multum* *non* *pro* *curia*
quod. When an immaterial answer so *values* into the
cause of action as to make a variation in facts, it must be
proved 2 Bl. R. 1166. Doug 640. 2. L. R. 446. 2. Inst. 497. 2. Co. Ray 309.

If the *plea* on either side wants four or irregularly and
is by the adverse party's *plea* over - but if it wants substance
or otherwise - The point is decided not on the ground that a
verdict over a *plea* but on the ground of waiver. 2. Co. Ray
1. Inst. 309. 2. L. R. 519. 2. Inst. 66. 1. L. R. 195.

but if the *plea* on the other side in the latter case

expressly upon a material fact omitted in the other
plea, shall be deemed and it - for he should be cautious
of connecting himself. 5. R. 197. Com. D. C. 6. 81. 48. 37.

In every stage of the plg each party has a right to
answer the allegations of the adverse party, either by deny-
ing them or confessing & avoiding them, or by demurring
to them, i. e. confess the facts but on their sufficiency
in B. to entitle the plts to recover - & there may be a
case in which it may be proper for the party, to
answer different parts of the plea in all these different
ways - By denying a part, by confessing & avoiding a
part, & by demurring to the rest - he has this right
till a proper issue is tendered, - for when a proper ten-
der is offered on one side the other must accept it 3. Bl.
309. Com. 148. 2. 50. 54. Com. 575.

Thus in the case of assault & battery & wounding, in
which this happens more frequently than in any other
he may deny the assault, justify the battery by alleging
some new matter of his own - & demur to the wounding.

But tis a G. B. that when any new matter is alleged
on either side after the declaration, it must conclude with
a verification - & this he is ready to verify. This is neces-
sary to give effect to the other R. - for if he could conclude
to the country, he would join an issue in which the other
party must join, & he would be concluded upon
either answer than denying. Com. 575. 2. Com. 772. 3. R.
309. Doug. 54.

The first answer is to come from the Def. - suppose
then he answers the declaration, he may deny the
whole, this is the G. issue - he may plead in bar, viz.
in infancy, coverture, accord, &c. this is confessing
& avoiding - or he may demur which is issue in law.

904/2

Pleading

If he pleads the 4 if the Plg are dead - so also if he
 surrenders - if he pleads in bar, the Plt may traverse or
 aver special matter in avoidance - as he may traverse
 to the implication of the Plt the Def may reply - &
 the Plt may answer by a rejoinder - to which the
Def may submit - & the Plt may answer him by a sur-
 rebuttal - no special Plg has ever gone farther than this
3. Bl. 310. 4. Bac. 6.

In every successive stage of the Plg, whatever is after-
 wards pleaded on, the same must afterwards follow
 the declaration, or the first Plg by answering what is
 objected on the other side - the subsequent Plg must not
 vary from the defence first set up - a variation is al-
 ways called a departure in Plg, which is never allowable
4. Ba. 6. 1. Inst. 204. 2. Bl. 310. Clav. 7. 2. Ray. 1449.

And regularly the judgment of the J (or L as it is called) is
 to be rendered upon a view of the whole record - & also
 judgment is to be rendered as the party making the first
 substantial mistake in Plg; thus if the Plt makes a mis-
 takes replication, a frivolous rejoinder will not be regarded
 by the J. Holt. 177. 200. 2. Co. 120. 134. 2. Co. 110. 1. Salt. 174. 1. Saine. 288.

Thus far of the 4 Pls of Plg - I shall now treat of the
 previous subdivisions - & first of the
Declaration.

The declaration being the foundation of the suit must al-
 ways show all that is essential to the Plt's right of action
 for he can prove nothing that is not alleged in the de-
 clARATION - for evidence is to prove what is alleged in the de-
 clARATION - each party's proof is to be secundum allegatio-
 nem. Row. 84. Holt. 199. 1. Inst. 17.

If the declaration avers any material fact to be ill - & if the
 Deen the allegation sufficient shows he had no right of ac-
 tion, the p[ar]ty can't have judgment. Thus suppose an ass[ault] on an
 bond - the p[ar]ty dates the writ the day before the bond was
 due he can't have judgment. The same rule holds as to part
 of the declaration. 2 Co. 26, s. 2. Term. 997. Row. 85. 4. Burr. 19, 44.
Law. 6. 328.

It is settled however that if the party would to perform
 disables himself from performing, he may be sued & a
 recovery had before the time specified for performing
 arrives - Thus if A engages to employ B by such a time
 but before that time employs C - B may maintain
 an action on it immediately. But I think this may be
 doubted on principle says Mr. G. - for A might before
 the time purchase back, & then employ B. 1 Co. 26, 2.

Hence you will perceive that the omission of any part
 of the gist of the action is an incurable defect - i.e. by plea
 over or by verdict.

The gist of the action is the ground of the action, without
 which the p[ar]ty has no right to recover. No in trover owner-
 ship is the gist of the action - & if the p[ar]ty states the taking
 & refusal to deliver up, but neglects to state a conversion
 he can't have judgment. 3. s. Mod. 905. Doug. 688 3 Bl. 395.
4. T. R. 472. 2. H. Bl. 201.

In the body of the plea you will find the words inducement &
aggravation. By inducement is a statement of the man-
 ner in which it took place by way of introduction - this
 is frequently necessary in order to understand the principal
 matter - Aggravation explains itself - neither of these is
 the substance of the action. Lam. 66. 9. 70.

Thus far of the 4. parts of the declaration. There follows.

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some particular rules relating thereto.

1st The allegations must be certain - i.e. clear & intelligible. Different degrees of certainty are required in different actions. In some cases the utmost certainty is required - certainly relating to parties, time, place, & subject matter. If on these means that the opposite parties may know how to answer. 2nd That a regular issue may be joined & found pro & contra. I may know how to under-stand & explain - Certainty is required in matters of inducement & aggravation because they can't be traversed - they are merely explanatory. 4. Bac. 8. 1. Inst. 305^a Plow. 44. 122. Bro. & Ry. 77. 5. 60. 38.

Certainty will be treated of under subject matter - however in I would just observe that the words, or, against, & such relative terms are never sufficiently certain unless there are two antecedents to which they may refer. 8. T. R. 78. 2 East. 56. 2 Ray. 588.

A declaration may be ill in part for uncertainties & given in the middle. Com. & Ry. 692. 2. Summ. 372. 1. Talk. 218.

When a declaration is faulty, advantage is to be taken of it by demurrer, or motion in arrest of judgment at all - tho' tho' it may, & am bound ex officio to take notice of it - it can't regularly by plea in abatement be reached - but nevertheless it is to be met by plea in abatement - because it do appear on the face of the declaration - So also when the declⁿ & count vary, it must be removed by plea in abatement 4. Bac. 8. Talk. 219. 220. 1. Bac. 8. Will. 578.

A count which at L. C. is not good without being written must be declared upon as written - such as a count for so also a count under seal to the L. C. & created by stat & required to be written must be so declared upon - but when a count not required by L. C. to be written, is by stat required to be written, it need not be declared upon as written - &

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20 of the stat of judic & remedies - this stat introduced
no new R. of plg - but a new R. of evidence merely 6. 60. 98.
12. Mod. 540. B. N. P. 270.

The p^{ty} in a declaration an a d^{ed} is not bound to set forth
any more of it than is necessary to enable him to recover.
A d^{ed} may contain any number of counts & only one of
them be broken - now the p^{ty} need show only the breach - & so
if a d^{ed} should contain a proviso which would defeat him, he
need not state it, but if it is in the body of the d^{ed}, or if it is
a condition precedent it must be stated.

If from the facts stated the l^y will raise a proviso still
the proviso must be stated in the Declⁿ except in case of
promissory notes & bills of ex. 10. 196. Salk. 128.

A d^{ed} may be either g^{en} or special in our case the state
ment of the cause of action is more general than in the
other - so in ind^{ist} it is a presumpt - for money had &
received, he must state it generally as he may show how
the d^{ed} received money to his use - so also in Eng in an
action for disburse, the p^{ty} may declare generally on
disburse his own lth. 4. Ro. 8.

The Joinder of Parties in a Declⁿ.

Joinder of p^{ties}. As a g^{en} R. that where two or more per
sons are jointly interested in a right, they may & ought
to join in one action for the violation of it - & this is
the R. whether the action sounds in tort or in contract, as in the case
of joint obligors, covenants &c. So joint tenants should join
in an action of trespass or their joint estate. 1. Inst. 164. 1898
2. Bac. 626. 8. Co. 12. 19. 8. T. R. 651.

On the other hand where the right violated is several or

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or not - If in case of costs they must be joined - If ^{3/4} two or more join in committing trespass, they may or they may not be joined - Here all or any of them may be joined as ~~parties~~ in the action - so may two or more persons be joined for malicious prosecution. B. & P. 1. Habit 6. Catcl. 1. 4. Bac. 10. 2. 2. Burr. 788.

And according to distinctions taken you will perceive that two persons can't be sued for distinct acts of Tort, committed severally. Attk. 183. 4. Bac. 10.

If there are two or more joint obligors, co-sureties or guarantors, & one of them dies, the estate of the deceased can't join the survivor in suing on that contract. The survivor can't sue the estate, & the right to sue survives to the survivor alone, but he must account to the estate - he is a trustee to him. So also as the last survivor has the sole right to sue, & survive to his estate entire - he must account to the other estate. 1. Bos. & Pul. 458. 1. Best. 477.

As to Costs. If two or more persons make a joint contract they must all be joined in any action brought on that contract. 3. Bac. 697. Attk. 777. 2. Burr. 97.

But if two persons bind themselves jointly & severally, in then in all may be sued - but more than one & less than all are not liable to be sued - i. e. two of them are not liable - for two can't be considered as either joint or several. 3. Bac. 678. Gels. 26. 1. Sidg. 298. 2. T. R. 782.

And I would here observe that if two or more bind themselves by one contract, the contract is joint of course - unless the terms of it imply a several duty or obligation - as we promise to pay, implies the same as we jointly promise to pay. And words jointly & severally make it joint & several contract. 3. Bac. 697. 2. Attk. 98. 1. H. Bl. 236.

And if two persons are joined in a joint contract, one of them dies, his estate is not liable at l. to be sued, with the remaining party in the action. 1. East. 500.

If there are several extra & an action is to be brought on them it can be brought only on those who were admitted and accepted the trust. The 3 is defendant where they are plaintiffs. Land 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849,

Thus pair of pander & non pander. If pander of causes of action is an declaration between the same parties - that is that several causes between the same parties may be joined in the same Declⁿ if of the same nature - this is a vague P. By causes of action of the same nature are meant those of similar. This P. is not well expressed. Conn. D. tit Action. §. 206. 11.

What is meant by causes of action of the same nature has
been so to be causes which require the same judge at C. L.
there are so to be within the R. & may be joined - this is a
q. the rest are universal R. Gell. Con. Page 7. & Ba. 11. 1 Hunt 366.

This debt on bond & oath or loan may be joined in one declaration, making two counts - there are at the same nature. But the difference here is different. So also debt on bond, as judge & an simple count may all be joined in the same declⁿ. being ninety - tho' the diff. if you would be different in all - the diff. if you ^{do not} judge would be ~~not~~ till more, on bond non est p^r time. & un debt nil debet two. 601. 1. But 966. 1. 87276. 1. Wils. 252.

Now in these cases the judge at 6 L. would be the same. &
so the best A. was not universal. but tis universally
true that if several causes of action, require the same
judge at 6 L. & the same by issue, they may be joined. & the
verdict may be read upon in our Doctrines. C. 1. 976. 1. lib. 2 C.

Reading

9/15.

I find it has been questioned in some books whether an action of judgment can be joined with an assault & battery. There is no objection to joining them - they are trespasses both have the same issue. Quere. 1. Fidd.

Several trespasses may be joined in the same Declar. when they are committed with force. For have the Indict. and the verdict, which is a capias at l. b. as assault & battery quere declarum pergit.

So also several trespasses as the case may be joined in one Declar. as trespass, slander, malicious prosecution, &c. The issue, & judge are the same in all these actions the judge is universis. 8. Co. 7. 8. 1. Vent. 223. 1. Wils. 252. 2. Do 30. 3. East. 70. Bouv. 230. Doug. 652. 2. Bl. R. 448.

So also in many cases when the l. issue is different & the judge is the same, two causes of action may be joined in one Declar. thus Debt & Detinue may be joined in one Declar. - the l. issue is the same - so Debt on bond or loan on Debt may be joined & Bar. 11. bro. R. 20. 416. 1. Kibb 157. 2. Vent 461

So undoubtedly Debt & concurrent may be joined in one Declar. tho I know of no such case. Quere. 1. Fidd.

So I think Debt & assumpsit may be joined tho the judge is the same tho the l. issue is different - Quere. 1. Fidd.

But when tis so that several causes of action of the same nature may be joined tis to be understood that they all accrue in & are sued for in the same right - for if they accrued in different rights they cant be joined tho the parties are the same - So extr. cant join money had & received to his own use as extr. & other money had & received in his own private capacity; for he there was in two distinct characters - for in this case there can be but one judge - Yet cant be known how much he receives for the different rights - tis the same as if two different

the same in both or all the actions, they may universally be joined in one debt, tho in different counts.

2^d In many cases where the l^y issue is different, they may be joined if the judge are the same. Thus R. however is not universal, & this can be only learnt from cases. There is no discerning the distinction. The cases that seem to include all the exceptions. In the other hand where the judge are different, they never can be joined - a fortiori if l^y issue & judge are different.

If different causes of action are misjoined there can be no recovery - tis an incurable defect, & the Court may either dismiss, or let the suit go. I cannot find the judge Kent 496. 2 Br 99. 144. Bl 108.

A misjoinder of causes of action is totally different from what is called duplicity - by misjoinder is meant the joining in one debt such causes of action as can't be joined. Duplicity is a defect in form.

Why misjoinder is incurable is, because there can be no stop or judge in this action - for a misjoinder would require two different judges on the different counts - but there can be but one judge on the same action - yet there is a material difference to be observed where there are two causes of action, & but one cause of action accompanied with aggravation - thus in an action of trespass, quare & non, breaking house, destroying goods, & beating his S. now here is but one cause of action - the breaking the house the gist of the action - the destroying the goods & beating the S. are the same matter of aggravation - tis but a continuation of the same injury at force - Tho the breaking the house & beating the S. are the grounds of two separate actions that can't be joined - yet he may say the beating of the S. & the consequential damage, with a pro quod & recover by way of aggravation - that there can not 2

separate action, joined a person from this - that if the Def^r can justify the making, he justifies the whole & there can be no recovery, except by a second assignment for the use of service. 2 Co. R. 1132. Earth. 1132. 1 R. 167. 8 Co. 361. 6 East. 384.

Without a plea good there can be no defence of tort of service. The p^{ty} may say there several causes of action in one Dec^r tho he is not obliged to it - he no fault that he has not joined them - but when there are several actions brought for causes of the same nature, he must join this to comprise the p^{ty} to join them in one Dec^r - but they will not so if there are two different grounds of defence, or different subjects to or on them - they order this consolidation to save costs. 12 Mod. 252. 2. 1 R. 632. 2 Str. 1147. 1178. 4 Ba. 11.

When there is a mortgage the p^{ty} can't claim the right of entering a note prosequi as to one count as part of the Dec^r the whole Dec^r is destroyed - he may however enter a note prosequi as to the whole. 1 H. 3. 164.

Miscellaneous Rules.

The Def^r must agree with the writ for this is the ground of all the subsequent proceedings - for if there is a variance in the name as a Dec^r without a writ - which is an avowry. 2 Ba. 12. B. Dec. & the 47. Hove. 180. Cro. 632.

When the right of action accrues upon the performance of a condition precedent, the p^{ty} must show such performance or he shows no right of action - & this avowry is an irreparable defect. 2 Mod. 1. 12 Mod. 312. 1 P. 548. 7 Co. 128. 2 H. 574.

But when the right of action is qualified by condition subsequent, such condition he need not show - tho matter of defence to the p^{ty} & he must plead it as he wishes to

to take advantage of it. 4. to 10. 10 R. 132. 4. Do. 65. 1. 4. 36. 295. 7. Do. 5. 74.

So also if there are reciprocal covenants the day is not
 given to any performance on his part - but if they are
 dependent he must see performance of his part. Thus
 if A promises to deliver a horse to B in six months & B pro-
 mises to pay 1000 - A may sue B without averring the
 delivery of the horse - for the promise to deliver the horse
 is the consideration for which B promises to pay, & this
 promise is performed - but if the promise was to pay
 if he delivered the horse he must aver delivery. 4. to 10. Holt 56.
1. Bar. bar. 35. Comb 265. 1. Lev. 299.

It has been ordered that the p^{ty} pay costs up to the time
 when the p^{ty} ordered a consultation of counsel with the
 defence neither for or against in it. 2. 1. 1.

When the defect is good in part & ill in part, & the p^{ty}
 claims to the whole the defendant is sumamed. Because
 the p^{ty} is entitled to recover on a good count in the defect
 tho another count be ill. 1. Scut. 286. 2. Do. 377. Cro. 104.
Holt 178. 10. Co. 115.

But in cases of this kind where the defect is good in
 part & ill in part, if the p^{ty} claims to ignore the defect
 is found with entire damages, just as much as if it were
 good it can't be determined how much damage was due
 to the different counts one being good & the other ill.
 But if the verdict assigns damages to each count separately
 as the amount of each demand appears on the record
 the p^{ty} must have judgment for the good counts in his or
 satisfaction. Holt 178. Cro. 104. 1. Sellon. 480. 1.

But the R. that the p^{ty} may recover on a count that is
 good joined with one that is bad in the same declaration
 can't apply to one entire undivisible demand part being

good & part true. The whole Debt in that case is paid. If a plea to a debt does answer the whole of it, the plaintiff may recover on the whole debt. Thus suppose the plaintiff sues for assault & battery & ravishment - & the Defendant pleads the assault only, the plaintiff will recover on the whole debt. 1. Saund. 24. 397. Comm. D. 24. 96. Do. 9. 25.

If the jury of assumpsit damages more than the plaintiff demands, they may release the surplusage & take for what is demanded - but he is not under the necessity of doing this, as the court will give judgment for what he demanded only. 1. Co. 118. 4. Bac. 25. Stat. 36. 2. Bac. 223. 1. Sellen 481.

And so if the plaintiff should demand more than he has answered, showing he has a right to recover, & the jury should give more than the excess, he may release the excess & take the rest. So if in the action of ejectment the plaintiff sues for two pieces of land, & it appears from his own showing that he had no title but to one, & the jury find verdict for both, he may release the one piece, as the court may give judgment for the one as they are bound ex officio to do. For the plaintiff never can recover more than he demanded, nor more than he has a right to by his own showing. 4. Bac. 26. 1. Roll. 788. Stat. 17. 1. Pourn. 182. 8. note C.

If the debt is insufficient in form to require answer by the answer. If insufficient in substance he is aided by the Defendant showing what ought to have appeared in the debt. 4. Com. 6. 1. b. 83. 6. 37. 2. Co. 118. 4. 2. Co. 250.

Pleas which follow the Debt

These commence on the second of the Defendant. The Debt is the plea of the plaintiff. The pleas of the Defendant are of 2 kinds. 1st Pleas to the fact. 2nd Pleas to the action. Verbal pleas are so called because they were formerly used, without any colour

Pleading

of foundation merely to support the action - these don't bring ³²⁰
the ground of the action, nor apply in the case to themselves
of the cause. 3. Rec. 303.

In Eng. by a stat of Chm no dilatory pleas are permitted
to be pleaded without an avowment of their truth, or
some proof of their being true. 4. Rec. 38. in note. 1. R. 392.
3. 4th. 52.

Dilatory pleas are of three kind, 1st to the jurisdiction of the
ct. of this there are several kinds - as the privilege of
the ct. from being tried in such a ct. as that there an
allay in another ct.

So also where a cause arises out of the jurisdiction
of a ct. of limited jurisdiction the ct. may place the ju-
risdiction of the ct. 1. R. 8. bench 11, 394. 4. R. 394. 2. R. 407.

But this privilege of allay holds only where he is
sued in his own right, not in those cases where he is
sued in the right of another as wife ~~in dote~~ ^{in dote} nor where
he is copart with another person who is not privileged
- for he can't communicate his privilege to another.
Nor in an action not cognizable by the ct. of which he is
an allay or ~~officer~~ ^{officer}. As in the case of most actions in
Eng. which are not cognizable by the H. Ct. in those cases
he can't place the jurisdiction of the ct. 1. R. 6 548. 3. R. 4.
Holt. 177.

But where a ct. has jurisdiction as the ct. of C. has
it can't be pleaded to the jurisdiction that the cause of
action arose in a foreign country, if the action is
a transitory one, but otherwise if it is a local one. Real,
criminal & penal actions are local - But actions such as
aft. detent, trover, aft. & Bailly &c are transitory & may be
sued in any country tho the cause of action arose in

another case. 161. 175. 181. 2. Henry. Bl. 145. 161. 2 --

Every sovereign state is ~~as~~ as to every other sovereign state a foreign state. As to all municipal regulations, it is to be as much a sovereign state as others. No criminal can be punished in law, for a crime committed in ch. by nor can any real or personal action be prosecuted in law which cannot in ch. by but transitory actions may.

And then plea to the jurisdiction is, that the ct has not cognizance of the subject matter - but he need not shew, for this is non cognoscere non iudicare, & the Jt may against the plea - & the ct are bound ex officio to dismiss every such case. So the ct of B. Pleas can't try a criminal for murder. 10. Co. 64. 1. Inst. 343. 1. East. 382. 4. Bac. 35.

A plea to the jurisdiction is the first in the order of plea because he so he waives by plea over - but this is not always the case - as in those cases where the ct have no jurisdiction over the subject matter. 1. Inst. 127. 3. Holt 164. Contra 1. Tidd.

According to the English practice the plea to the jurisdiction must be the first, & not by his attorney - for the attorney is to get leave of the ct to plead & by asking leave he acknowledges the jurisdiction of the ct. 4. Bac. 46. 1. 1. 1. 1.

But this is not the case in law. This plea concludes to the jurisdiction of the ct. i. e. whether the ct will have jurisdiction of the cause. 4. Bac. 32. 9. Bl. 309. Burth. 963. 5. Hvd. 158.

It was formerly the case tho now in law, that if the cause was dismissed on a plea to the jurisdiction by the Jt that the ct would tax the pty with the Jt's costs - but if dismissed ex officio by the ct, they did not tax the costs but the taxing costs is both without & by reason - the pence per

Doing this was to prevent the p^l from bringing in a bill
 & the D^{pt} to remove it for his exposure. but this must
 be done by another prosecution, which transgresses cannot
 be brought not to prevent.

2^d kind of disability places according to my distinction of
 them are those to the disability of the p^l - i. e. his disa-
 bility for some cause to maintain the action. These causes
 of disability are various. The first of them is outlawry
 - this is unknown in law. the 1st is a bill from some
 of the states as N. Y. Outlawry disables the p^l to maintain
 any civil action - in his own right till the reversal of
 outlawry is reversed. An outlaw is one out of the protec-
 tion of law to maintaining any civil action for injuries
 done to his p^l but not for injuries done to his per-
 son or character - for he may maintain an action for
 battery wounding or slander. 2. Ba. 76. 2. 1. Inst. 1. Inst.
 128^a 1. Ba. 2

Outlawry when it takes place after the right of action
 accrues, does not abate the suit. it is only a temporary imped-
 iment till the outlawry is reversed. The D^{pt} must then
 plead to the writ. But if the outlawry takes place before
 the right of action accrues, the plea of outlawry totally
 destroys the writ. & it must be commenced & served after
 the outlawry is reversed. 12. Mod. 604. 4. Ba. 95. 1. Inst. 202. 2

This disability of outlawry extends only to such actions as
 are brought in the p^l's own right, not to those in
 behalf of another as executor. & in the rights of oth-
 ers would be infringed, as no other person can bring
 an action in such right, while the outlaw remains in
 that capacity. 1. Inst. 128^a 3. Ba. 76.

But on the other hand the outlawry of the testator or
 intestate may be pleaded in abatement to an action brought

by his entry in action, for if the person in whose right the action is brought has no right to maintain it, no agent or minister of his has a right to ~~be~~ can maintain it in that right. 1 Barn. Dig. 6.

But tho an outlaw cannot maintain an action he may be sued - for the outlawry is intended to deprive him & not to afford him an immunity. 2 Ba. 761. Noy 1.

Outlawry may always be pleaded as a dictatory plea & sometimes tho not always, it may be pleaded in bar to the action. The R. is that where the cause of action itself is perpetrated as an outlawry per felony, the outlawry may be pleaded in bar - because all the King's goods, chattels & services are forfeited to the king - hence the King has no right to them not on the ground of the outlawry, but because they are none of his - But in this case the outlawry may be pleaded as a dictatory plea. 5 Co. 102. d. 60. 29. l. 1. Inst. 29. 128.

But where the cause of action is not forfeited the outlawry of the King cannot be pleaded in bar, but only as a dictatory plea. & an outlawry for a crime short of felony such as a perpetration of trespas goods chattels &c. & hence is not pleaded in bar. So where an outlaw sues for an aft & battery, slander, malicious prosecution &c. or any injury to his person or character, his outlawry cannot be pleaded in bar but to his disability - for these rights are not forfeited. As to the action & dictatory plea cannot be pleaded for this same purpose i.e. the same matter cannot be insisted upon for 2 different purposes. 1 Inst. 128. 3. Ba. 761.

The next disability at C. L. is excommunication. But this is now unknown. 1 Inst. 133. 5. & Co. 3. 2. Ba. 313. Excommunication does not abate the writ. excommunication is the only good special matter to allege as a plea of excommunication. 8. Co. 76. 2. Ba. 320. 1. Inst. 139.

Another ground of disability is alienage - this in some cases is a legal disability, this not in all. An alien tho an alien friend can't maintain an action real or mixed tho he can sue in real actions. Lawd. 171. 2. Pl. 984. 1. Do. 971. 2. H. Pl. 162. 1. Ba. 89. 4. 84.

An alien enemy can't maintain any action in a Ct of L. - he is under the protection of the L of nations & must apply to such Cts as are provided out by the L of nations as to maintain &c. Str. 1082. 1. Ba. & Pl. 168. 6. C. P. 24. 1. Ba. 89. 4.

This is a G. tho not a universal R. - for tis settled in Eng. that he may maintain an action on a ransom bill. Bray 619. 625. Burr 1794.

So also if an alien enemy under ransom, or has a license or protection to come & reside under a govt he may maintain real actions. Salk 146. Str. 1082. Fost. 221. 4. C. P. 165.

Its unsettled whether an alien enemy without a license or protection, can maintain an action in the right of another. Bro. 2. 142. 649. 1. Ba. 84.

One of two things seem to be clear, either he ought not to be allowed to maintain the character of agent for another or he ought to be allowed to avail himself of it. An alien friend may maintain an action for chattels real in the right of another. 2. Pl. 90. 4. Ba. 148.

The next disability is coverture. Where a W. sues without joining her H. this disability may be pleaded, but not if she joins her H. with herself in the action. 1. Pl. 432. Inst 192. 4. Ba. 99.

But coverture says Ed. Heydon is pleaded in abatement not to I think mean properly a dilatory plea it goes, not to the action but the disability of the pty. Benth 124. 9. C. P. 691.

Tis a G. tho not a universal R. that whatever can be taken advantage of as a dilatory plea, can't be pleaded in any subsequent stage of the proceedings. C. P. 166.

Is a R in Eng that if a woman marries, pending the suit brought in her own name, the suit shall abate not so in Lam. 1. Pl. 316. 4. Ba. 99.

If the pty is an infant, suing without guardian or next friend, tis pleadable to his disability - for he can sue being guardian or next friend. 1. Ba. 142. 2. Pl. 901. Barth. 129. 1. Inst. 135.

And lastly tis pleadable to the disability of the pty, that he is not in spe. So if an action is brought in the name of a fictitious person, this plea may be made 2. Pl. 901. Ba. 2. Inst. 54. Lam. 104.

As to the disability of the pty, conclude to the harm of the pty thus "wherefore he prays judge who then the pty ought to be assumed" This is the case where the disability is a permanent impediment. But where the impediment is temporary as an outlaw or excommunicate person, he prays that the pty may remain without any let the impediment is removed. 1. Ba. 142. 2. Pl. 303. Lam. 103. 1.

3^d Kind of dilatory pleas are pleas in abate. the word abate in 1 denotes prostration or demolition, as in case of nuisance or misnomer. so to abate a suit is to abolish it. 1. Inst. 134.

Pleas in abate generally intend to the suit only. It takes in the count or declaration to be attacked in a different manner. viz by pleas to the action - as if the defect appears upon the face of it to be erroneous 2. Pl. 901. 1. Ba. 15. Barth. 128. Barth. 177.

It being then so difficultly to distinguish the suit from the declaration for they are inseparably. But in Law they are one joint instrument. Here the suit consists of that part of the record which precedes the statement of the cause of action - the declaration begins with the words "whereupon the pty declares" & ends with demanding dam.

ages, & then the writ commences again with "homo
fidei non h." The writ contains that part directed to the
sheriff, the date, returning &c. The declaration that tract
which states the cause of action & demands damages.

But tho' it is generally, yet not universally true that the
plea of abatement can reach the defect - a plea which goes to
the writ is always a plea in abatement - but a plea in a
battel don't always go to the writ. So misnomer is good ground
for this plea, & this is in the defect. So also where there is
a variance between the writ & defect the plea of abatement
is the proper plea - tho' I think that the plea in this
can go in strictly to the writ. 9 Ba. 124. 94. & Do. 8. 90.
barr 105.

In bar in the com. practice to take advantage by plea
in abatement of a variance between an instrument declar-
ed upon & its description in the defect. In Eng. ~~practice~~
advantage is usually taken by praying over of the entire
writ & then by demurring or objecting to it in evidence &
this may also be done in bar.

Pleas in abatement are always represented by judges & law-
yers as odious pleas, because tho' don't go to the merits of the
cause, but only to delay the pty of his suit & put him to another
action - & tis a b. that the least inaccuracy in a plea of a
battel is fatal to it - they are not pardoned by the c. 3. 1.
R. 135. 4. Do. 481. & Do. 167. Com. D. tit. Abatit 11. barr 56. 107. 134.

The causes or grounds of abatement are either extrinsic or in-
trinsic. The cause may be in the writ itself or extrinsic
as in the service of it. 1st Cause of abatement is that of
misnomer, & want of additions. Misnomer of opt is
ground of abatement whether the mistake is in the writ or
defect. 9 Ba. 124. Salf. 7. 9. Barr. 167.

So also a want of the Def's addition is in Eng a cause of abate - by this want a description of Def added to his name, as his title, degree, place of abode &c. there are in order to make it no. certain. There are particularly required by stat 1st Hen V. 4. Pl. 306. 4th H. 6. 931.

The ct. of Eng are not so particular as to the place of a Def as they are in Law. In Eng is sufficient to describe the Def by any of his titles tho he has none. Baro 106.

The stat of Hen relates to real actions applicable & insist. & not to real actions for in them you describe the land in which he is in possession, & this is sufficiently certain. 6th H. 6. 93. 9. Baro 614.

A mistake in Def's addition is pleadable in abate as well as an omission. 9. Pl. 302. 2^o Ray 1014.

In Law the only addition necessary in the Def's place of abode in L. cause - we add no title when a name is used in his private character.

The place of abode is more necessary, because in all transitory actions, the action must be brought in that county where either the pl't or Def lives.

But where one is sued in his official or civil capacity his official or civil character as title must be added for this is inducement to the action. & this is necessary to show the right of action, & not for certainty of description. So where sheriff &c is sued for a neglect of duty &c his official character must be added & so too if one is sued as him extra curia. Baro 902. 2^o Vent 44. 9. Baro. 620.

But when addition by way of inducement is unnecessary it is mere surplage & does not vitiate the writ. So if an action should be brought vs A, with addition that he is heir of B - now if he is not heir of B it is of no consequence & will not vitiate the writ. Baro 4. 933.

But a misnomer or want of addition ~~as a matter of fact~~ of one of 2 co-defs, is not pleadable in abatement as the other is not. He cannot take advantage of it as a misnomer tho he can on the score of variance - for the 8th misnomer may if he will admit the misnomer. The same is not misnomer as well as civil action. 3. Ro. 626. 2 Do. 46. 2. Holt. Rep. 177.

It is questioned whether if a writ for a nuisance is abated as to one of several defendants it abates as to the others. The question is then generally stated, I think it can have no decision - for it makes no distinction whether the cause of action is joint or several. If however the cause of action is joint & the writ abates as to one I think it must abate as to the others - for one cannot be sued alone & this is the same as joining one of 2 joint defendants - but when the cause of action is joint & several or several, I see ^{no} reason why it should abate as to all if it abates as to one. But there is no decision as to this point. Benth. 76. 5. Do. 154. 3. Ro. 625.

That defendant who pleads misnomer or want of addition must give the plaintiff a better writ - i.e. he must set forth his right name or right addition, that the plaintiff may not sue again - & this R. is generally true as to all abatements. French. 389. 5. T. R. 515.

But great particularity is necessary as to this plea of this misnomer - the defendant must not only state his true name, but must transcribe the name by which he was called in the joint writ. Will. 554.

But he must also state that he was known & called by his true name, at the time of issuing out the joint writ. Do. 118. 257. 5. Nov. 357. Jack. 5.

And if the Deft in filg abates for misnomer begins it in the same form in which he signs a plea in bar, it is always bad, for by calling himself in the plea, the Deft &c. he admits that this is the true name he should place there. & now C & D who in the filg must be sued by the name of A. B. never depose the force of 1811, 1812, 1813, 1814, 1815, 1816.

This process of abating i. e. misnomer & want of designation, must be taken advantage of, as plea in abatement or dilatory plea - for he is aided by filg over. 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th, 71st, 72nd, 73rd, 74th, 75th, 76th, 77th, 78th, 79th, 80th, 81st, 82nd, 83rd, 84th, 85th, 86th, 87th, 88th, 89th, 90th, 91st, 92nd, 93rd, 94th, 95th, 96th, 97th, 98th, 99th, 100th.

If one executes an instrument by a wrong name, & an action is brought on such instrument, he must be sued by such wrong name, & his true name must come in under an alias. Now I think this is not the proper way. I think he should be sued by his true name, & then allege that he signed the instrument by a wrong name - this is clearly a right & I should say the right way. 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th, 71st, 72nd, 73rd, 74th, 75th, 76th, 77th, 78th, 79th, 80th, 81st, 82nd, 83rd, 84th, 85th, 86th, 87th, 88th, 89th, 90th, 91st, 92nd, 93rd, 94th, 95th, 96th, 97th, 98th, 99th, 100th.

I was formerly thought that a mistake in the Christian name was not grounds of abatement - but a mistake here is now on the same footing as a mistake in the true name. 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th, 71st, 72nd, 73rd, 74th, 75th, 76th, 77th, 78th, 79th, 80th, 81st, 82nd, 83rd, 84th, 85th, 86th, 87th, 88th, 89th, 90th, 91st, 92nd, 93rd, 94th, 95th, 96th, 97th, 98th, 99th, 100th.

When two or more persons are to be sued some must describe them by their proper names, naming the firm of a company is not sufficient as 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th, 71st, 72nd, 73rd, 74th, 75th, 76th, 77th, 78th, 79th, 80th, 81st, 82nd, 83rd, 84th, 85th, 86th, 87th, 88th, 89th, 90th, 91st, 92nd, 93rd, 94th, 95th, 96th, 97th, 98th, 99th, 100th.

But as to incorporation the R is otherwise - they are to be sued by their corporate names. 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th, 71st, 72nd, 73rd, 74th, 75th, 76th, 77th, 78th, 79th, 80th, 81st, 82nd, 83rd, 84th, 85th, 86th, 87th, 88th, 89th, 90th, 91st, 92nd, 93rd, 94th, 95th, 96th, 97th, 98th, 99th, 100th.

His name necessary for the Deft for the sake of remedy, to take advantage of a misnomer - for if he should afterwards be sued for the same cause of action he may plead the former

necessity in law, the true had in a wrong name. Star 1218.
9. Bac. 625.

A misnomer of pty is ground for the plea in abate but a replication that he is known & called by that name, as well as the other is good. 1. Inst. 542. 1. born. 52.

But a minor addition given to the pty. and in by plea in abate it can't except as at b. l. for the pty is not known by his appearing & naming at b. l. 3. Bac. 617.

The statute as to addition must extend to the pty. 1. Show. 372.

Upon a mistake as to the pty's place of abode is good ground for abatement. At b. l. misnomer was not pleaded in abate to an indictment for felony; but now by the stat. of Hen. 8. misnomer may be pleaded in abate to all indictments. 2. Hawk. 180. 1. Hale 243. 1. Ho. 40. 4. Bac. 332.

^{Just} The record cause of abate is courtesy of dyl. pty. wherein is a cause for a dilatory plea. 1. Inst. 132. 1. Ho. 140.

But is a fine note is said of pending the suit wherein will not abate the suit for otherwise she could by her own act abate the suit. 1. Ray. 1535. 1. Str. 111. bro. 192. 1. Bac. 9. 10.

But if a fine court would await herself of the cause, if said alone, she must plead it in abate & not in law for unless she pleads it in abate she waives all exceptions for it is aided by pty. 1. Catch 24. 5. Bac. 23. 39.

As in some of the books that wherein may be pleaded otherwise than in abate - & in some stage of the proceedings but tis clear she can't do this - & when tis so that courtesy may be pleaded in law, as under a ground of error tis meant that the Ct may do this - for she can't - he may appear

plead 'conclusion in any stage of the proceedings, & if plaintiff should in general in him he may have a writ of error. He cannot at the Heart be defeated by his negligence, the law makes his night. Salk. 400. 9. 2. R. 691. 5. Do. 691. Sider 286.

This writ of error however must be under the writ of
 4th & not be him alone. 3. 5. p. R. 16. 19.

And that two pleas arising from two facts make one H. & H. who are not such is a cause of abatement. But this is not immaterial for where a man gives credit to a woman as his H. he may be subjected in many cases. So if a man lives with a woman as his H. & suffers her to contract debts for necessaries, or if she demands them without his consent, he is liable for them. The reputation of a man is sufficient. Sider 108.

If an infant is sued without summons his H. cannot plead, this is no cause of abatement but the court will allow him to summon in the H. if he has one. If he has not writ of error and return, & this means he does by way of return when he is sued. Harwath's case on the 11th suggestion. 1. Inst. 89. 195. 5. 60. 92. 9. R. 427. Bro. 651. 2. Bro. 163. 1. Sider 10.

If an infant is sued on an allegation of his ancestor as an infamy writ in pleading has. now is it a cause of abatement. But the court shall determine i. e. the cause shall remain undisturbed and will be cause of an. 4. Inst. 185. Sider 108.

3rd

The next cause of abatement is the death of parties to the suit. as to the B. & H. if a writ is filed and pending the next the action died. 1. Inst. 139. 10. 60. 194. Bro. 2. 182. 1. Sider 10. If it was the name of one of several plaintiffs and pending the next. now also through abatement except in case of joint actions when there was a summons of ignorance. For summons was made and return to the B. But in most cases there is no exception 10. 60. 194. 6. Do. 26. 1. Bro. 74.

And at 6 L. if one of several p^{ty}s died after verdict & before
judgt, judgt might be arrested. Ray 482.

But if one of several p^{ty}s died pending the suit, the R at 6 L.
was, that the suit should not abate, but that the p^{ty} should
make an entry of such a cause of action, & proceed as the survivor.
2 C. Mod. 212. 1. Chanc. 186. Hurd 151.

But if in the cause case he should take issue, just as the
p^{ty} would in answer in toto. & I would remark that
a judgt as a dead man is always erroneous except in case
of a mere pro bene judgt as is called. When a cause
has been tried & ready to have judgt rendered upon it, & then
it postpones till the next session to consider on it - then the
the p^{ty} should die during the interim, then it might run
over judgt at the next term. But in this case it don't appear
in the record, that it was rendered after the p^{ty}'s death - it
enters as rendered before & the record could be disputed. Benth
149. 1. Barn. 58.

There are the R's of the C. L. but by stat 12. Car. 2^d 1889. 11th
Vol. & by our stat in Barn this immutability of estate is in
a great measure removed - So that now unless there state the
do in this; If there are several p^{ty}s & one or more dies pending
the suit, it don't abate if the cause of action is such as would
survive as the survivor. So also if there are two p^{ty}s, & one
of them dies pending the suit, it shall not abate if the
cause of action is such as would survive as the survivor.
In either case the death being entered on the record, the suit
will proceed 5 Car. 42. 2. C. Mod. 145. 1. Barn. 58. Stat. cap. 29.

But the cause of proceeding in these cases is very different
if a sole p^{ty} dies, where the action will then survive to his
estate - the estate or estate merely suggests the death of the
original p^{ty} in the record & proceeds with the suit. But
if a sole p^{ty} dies where the action would survive as private

or ad. the p^{ty} must take and charge us his ex^{tr} as ad^{rs} requiring them to show cause why judge should not go in them. 4. Ba. 52.

Real actions however abate in most cases on the death of the p^{ty} or d^{ty}. The heir to whom the estate descends is not put in the same situation with an ex^{tr} as ad^{rs} by stat.

But if a real action is brought by several p^{ties}, or several d^{ties} & one dies, it will survive to the survivors or the heirs as a p^{er}sonal action. 2. Ba. 1. Inst. 139.

^{2d} Another cause of abatement is what is called in L. a variance. By this means a difference between two things that the L. requires to be alike. 2. Ba. 53.

^{1st} If the death varies from the writ, it is abatable in a writ. The writ is the death abate, the writ. 1 H. R. 249. 4. Ba. 4.

If the variance is some matter of form, abatement is clearly in a p^{er}sonal. But it is so in some old books that if it is in substance, it is not necessary for the judge to say in arrears & the L. are bound to dismiss it ex officio. But this is not according to the present practice - it used to please in a writ whether, the variance is in form or substance. Hall. 222. 4. Ba. 58. Cro. E. 222. 121. 185. 196.

Contra. 2. Wils. 394. Salt. 664. 4. Mod. 247. 4. Do. 309.

So also a variance between an instrument used upon a writ & the description in the writ is good cause of abatement. 6. Co. R. 1. R. 281. 4. L. R. 313. 1. Ba. 46. 67. Ba. & abate. L. 12.

When there is a variance between the instrument used upon a writ & the description of it in the writ, the usual method in Eng. is to take advantage of it in evidence, under a p^{er}sonal L. 6. Co. R. 4. Do. 612. 687. 1. Hume 154. note. Doug. 640. b. 1767.

right of action is only in one, he pleads in abate. Hold.
77. 22. C. 10. 6. 148. 1. Roll. 24.

Thus far the misjoinder of p[ar]ties may be pleaded in abate. But there are some cases where this will not be done—advantage can be taken of it another way—for in case of cont. if one sues alone where another ought to be joined with him, the Def[endant] may take advantage of it under the 4. issue. So also if there is a misjoinder the Def[endant] may take advantage of it under the 4. issue. & in these cases if the cont. is a misjoinder the Def[endant] may pray aver of it, recite it & demur to the p[ar]ties. R. 1. 154. 1. 220. 1. 300. 1. 375. 1. 400. 1. 411. 1. 412.

In these two cases the Def[endant] is under no necessity to plead in abate—tho he may do it—per him the court decided upon is not the one joined. I should observe that according to the late decisions if one partner in trade withdraws his name from the firm, but still remains part of the profits, is not joined in an action brought by the company, still no advantage can be taken of the misjoinder. 1. 463.

Again if in an action of cont. one sues alone where others ought to be joined, i. e. when it appears on the facts that others ought to be joined, the action is fatally bad & cannot be cured by verdict. & it is for a misjoinder cont. he may pray aver of it, recite it & demur to it. 3. 463. 1. 466. 1. 467. 1. 468. 1. 469. 1. 470. 1. 471. 1. 472. 1. 473. 1. 474. 1. 475. 1. 476. 1. 477. 1. 478. 1. 479. 1. 480. 1. 481. 1. 482. 1. 483. 1. 484. 1. 485. 1. 486. 1. 487. 1. 488. 1. 489. 1. 490. 1. 491. 1. 492. 1. 493. 1. 494. 1. 495. 1. 496. 1. 497. 1. 498. 1. 499. 1. 500. 1. 501. 1. 502. 1. 503. 1. 504. 1. 505. 1. 506. 1. 507. 1. 508. 1. 509. 1. 510. 1. 511. 1. 512. 1. 513. 1. 514. 1. 515. 1. 516. 1. 517. 1. 518. 1. 519. 1. 520. 1. 521. 1. 522. 1. 523. 1. 524. 1. 525. 1. 526. 1. 527. 1. 528. 1. 529. 1. 530. 1. 531. 1. 532. 1. 533. 1. 534. 1. 535. 1. 536. 1. 537. 1. 538. 1. 539. 1. 540. 1. 541. 1. 542. 1. 543. 1. 544. 1. 545. 1. 546. 1. 547. 1. 548. 1. 549. 1. 550. 1. 551. 1. 552. 1. 553. 1. 554. 1. 555. 1. 556. 1. 557. 1. 558. 1. 559. 1. 560. 1. 561. 1. 562. 1. 563. 1. 564. 1. 565. 1. 566. 1. 567. 1. 568. 1. 569. 1. 570. 1. 571. 1. 572. 1. 573. 1. 574. 1. 575. 1. 576. 1. 577. 1. 578. 1. 579. 1. 580. 1. 581. 1. 582. 1. 583. 1. 584. 1. 585. 1. 586. 1. 587. 1. 588. 1. 589. 1. 590. 1. 591. 1. 592. 1. 593. 1. 594. 1. 595. 1. 596. 1. 597. 1. 598. 1. 599. 1. 600. 1. 601. 1. 602. 1. 603. 1. 604. 1. 605. 1. 606. 1. 607. 1. 608. 1. 609. 1. 610. 1. 611. 1. 612. 1. 613. 1. 614. 1. 615. 1. 616. 1. 617. 1. 618. 1. 619. 1. 620. 1. 621. 1. 622. 1. 623. 1. 624. 1. 625. 1. 626. 1. 627. 1. 628. 1. 629. 1. 630. 1. 631. 1. 632. 1. 633. 1. 634. 1. 635. 1. 636. 1. 637. 1. 638. 1. 639. 1. 640. 1. 641. 1. 642. 1. 643. 1. 644. 1. 645. 1. 646. 1. 647. 1. 648. 1. 649. 1. 650. 1. 651. 1. 652. 1. 653. 1. 654. 1. 655. 1. 656. 1. 657. 1. 658. 1. 659. 1. 660. 1. 661. 1. 662. 1. 663. 1. 664. 1. 665. 1. 666. 1. 667. 1. 668. 1. 669. 1. 670. 1. 671. 1. 672. 1. 673. 1. 674. 1. 675. 1. 676. 1. 677. 1. 678. 1. 679. 1. 680. 1. 681. 1. 682. 1. 683. 1. 684. 1. 685. 1. 686. 1. 687. 1. 688. 1. 689. 1. 690. 1. 691. 1. 692. 1. 693. 1. 694. 1. 695. 1. 696. 1. 697. 1. 698. 1. 699. 1. 700. 1. 701. 1. 702. 1. 703. 1. 704. 1. 705. 1. 706. 1. 707. 1. 708. 1. 709. 1. 710. 1. 711. 1. 712. 1. 713. 1. 714. 1. 715. 1. 716. 1. 717. 1. 718. 1. 719. 1. 720. 1. 721. 1. 722. 1. 723. 1. 724. 1. 725. 1. 726. 1. 727. 1. 728. 1. 729. 1. 730. 1. 731. 1. 732. 1. 733. 1. 734. 1. 735. 1. 736. 1. 737. 1. 738. 1. 739. 1. 740. 1. 741. 1. 742. 1. 743. 1. 744. 1. 745. 1. 746. 1. 747. 1. 748. 1. 749. 1. 750. 1. 751. 1. 752. 1. 753. 1. 754. 1. 755. 1. 756. 1. 757. 1. 758. 1. 759. 1. 760. 1. 761. 1. 762. 1. 763. 1. 764. 1. 765. 1. 766. 1. 767. 1. 768. 1. 769. 1. 770. 1. 771. 1. 772. 1. 773. 1. 774. 1. 775. 1. 776. 1. 777. 1. 778. 1. 779. 1. 780. 1. 781. 1. 782. 1. 783. 1. 784. 1. 785. 1. 786. 1. 787. 1. 788. 1. 789. 1. 790. 1. 791. 1. 792. 1. 793. 1. 794. 1. 795. 1. 796. 1. 797. 1. 798. 1. 799. 1. 800. 1. 801. 1. 802. 1. 803. 1. 804. 1. 805. 1. 806. 1. 807. 1. 808. 1. 809. 1. 810. 1. 811. 1. 812. 1. 813. 1. 814. 1. 815. 1. 816. 1. 817. 1. 818. 1. 819. 1. 820. 1. 821. 1. 822. 1. 823. 1. 824. 1. 825. 1. 826. 1. 827. 1. 828. 1. 829. 1. 830. 1. 831. 1. 832. 1. 833. 1. 834. 1. 835. 1. 836. 1. 837. 1. 838. 1. 839. 1. 840. 1. 841. 1. 842. 1. 843. 1. 844. 1. 845. 1. 846. 1. 847. 1. 848. 1. 849. 1. 850. 1. 851. 1. 852. 1. 853. 1. 854. 1. 855. 1. 856. 1. 857. 1. 858. 1. 859. 1. 860. 1. 861. 1. 862. 1. 863. 1. 864. 1. 865. 1. 866. 1. 867. 1. 868. 1. 869. 1. 870. 1. 871. 1. 872. 1. 873. 1. 874. 1. 875. 1. 876. 1. 877. 1. 878. 1. 879. 1. 880. 1. 881. 1. 882. 1. 883. 1. 884. 1. 885. 1. 886. 1. 887. 1. 888. 1. 889. 1. 890. 1. 891. 1. 892. 1. 893. 1. 894. 1. 895. 1. 896. 1. 897. 1. 898. 1. 899. 1. 900. 1. 901. 1. 902. 1. 903. 1. 904. 1. 905. 1. 906. 1. 907. 1. 908. 1. 909. 1. 910. 1. 911. 1. 912. 1. 913. 1. 914. 1. 915. 1. 916. 1. 917. 1. 918. 1. 919. 1. 920. 1. 921. 1. 922. 1. 923. 1. 924. 1. 925. 1. 926. 1. 927. 1. 928. 1. 929. 1. 930. 1. 931. 1. 932. 1. 933. 1. 934. 1. 935. 1. 936. 1. 937. 1. 938. 1. 939. 1. 940. 1. 941. 1. 942. 1. 943. 1. 944. 1. 945. 1. 946. 1. 947. 1. 948. 1. 949. 1. 950. 1. 951. 1. 952. 1. 953. 1. 954. 1. 955. 1. 956. 1. 957. 1. 958. 1. 959. 1. 960. 1. 961. 1. 962. 1. 963. 1. 964. 1. 965. 1. 966. 1. 967. 1. 968. 1. 969. 1. 970. 1. 971. 1. 972. 1. 973. 1. 974. 1. 975. 1. 976. 1. 977. 1. 978. 1. 979. 1. 980. 1. 981. 1. 982. 1. 983. 1. 984. 1. 985. 1. 986. 1. 987. 1. 988. 1. 989. 1. 990. 1. 991. 1. 992. 1. 993. 1. 994. 1. 995. 1. 996. 1. 997. 1. 998. 1. 999. 1. 1000. 1.

But in law there is no such thing as variance. So if one of two joint tenants sues another person in trespass, & intimates on the record of the joint tenants, he cannot take advantage of it under the 4. issue—but only in a plea of abate. Note the reason of this is that the evidence will not support the plea. In the case of cont. it runs thus, "I

Did not promise you but gave & B". But in the case of
 bond of both joint tenants are not joint, the plea of the
 the covenantant cannot be made - for he has in fact two
 papers on the p^lts, and the not his sole tenant. Whether
 in this case the the D^t paid the l^y issue, this the fact
 of the nonjoinder appeared on the face of the D^t - but
 he must plead in abatement. 6 T.R. 766. 1 Salk. 290
Contra. etc. 820. 1146. & Co. 18.

Again if two sue when the right of action is in one
 only, advantage of it may be taken under the l^y issue, the
 same as in the case of covenants - & the reason is, the D^t
 has not committed a trespass on these two p^lts - and
 you will remark in the case of two or more p^lts -
 one measure all must - p^lts cant be undone for one & in
 another But in case of 2 p^lts p^lts may be undone in one
 & not in another. Wes. 2139. 5 Ba. 200.

If one party assumes of great battle, and in an action joins
 in - tant for his share of the damage, & the D^t cant plead
 in abatement the nonjoinder of the other assumps, but suffers him
 to go on him, & afterwards the other party assumes for
 his part of the damage, the D^t cant be allowed to plead in
 abatement the nonjoinder of the other - for if a waiver
 the nonjoinder in the first action he cant plead it afterwards.
2 T.R. 274. 1 Salk. 116. 2 Do. 566. 642.

Of the Non & Misjoinder of D^t.

If one of two partners who are liable in court is sued alone
 he can regularly take advantage of it only by plea in a-
 batement. So if one of two joint obligors is sued alone, he must, find
 it in abatement - So of detentions, an simple cont unless it appears
 on the face of the D^t, that there is another party to the
 cont who is now living. the death is not bad unless shown

two points appear - his being not joint in the out & his being alive. There have been great contradictions in the books on this subject - but the more recent. Edwards opinion was founded on the ground that the plaintiff knows not who the parties are, but the Def. does, & must give him a better writ, by filing in abatement. This is a satisfactory, the not the legal reason - which is that the evidence don't support the action. Burn. 2611. 2. Bl. 347. 5 T.R. 651. 6. Do. 327. 361. Comf. 822. note 4. 271. 46. 6 T.R. 361. 444. contra.

But in case of torts there is no such thing as nonjoinder of Defs in strict legal sense for all torts committed by more than one are joint & several. You can sue all, or any number of them separately - but you can have but one satisfaction. There is an exception to this R. when the right of action grows out of joint tenancy among Defs - for then the action must be brought in all - M. G. 100 see also reason for this 1. Saunders 241. E. 5. T. R. 651. 2. Bl. 142.

Now in certain cases, in Eng. individuals are bound to do certain acts as a condition of tenure - as to repair a bridge road &c Suppose a joint tenant makes to do this - his part & all must be sued.

every new Def who is disclosed in a plea of abate^{etc} may also plead in abate that there is another Def who ought to be joined. But the one who comes in later this can't plead it. 9. East 50.

If an action on a joint & several count made by three persons and they must plead the nonjoinder in abate. 1. Saunders 241.

If two persons are sued on a count where only one is liable & advantage must be taken of it unless the y. of the evidence don't support the action. 1. East. 46.

And if two are sued on count of the jury find by official verdict, that the count declared upon was made by an only the judge must be arrested as to the whole. No judge can be rendered as sitting - for the count laid in the writ is negatived by the verdict. 9. East. 12

Now can the pty in this case enter a nolle prosequi as to one & proceed as the other - for this would be to change the parties & substitute one cause of action for another. 8. Bro. 47.

6th cause of abatement is the finding of a former suit between the same parties for the same thing. 1. Ro. 4. Do. 56.

This is to prevent frequent & unnecessary suits. It is founded on the maxim that the L. abhors a multiplicity of suits. But the suits must be of the same kind, or at least concerned - under the cause of action must likewise be the same.

If one commences his action in the first instance, so as to bring himself, for himself, the finding of the first action is no foundation for a plea in abatement. The pty may bring another action before the pty has taken advantage of the first - otherwise judge might be delayed - but not necessary that the action should always be of the same kind - for many actions are concerned which are not of the same kind - as two & three, often cases this is a good plea tho the first action is in another count, 8. Ro. 61. Holit. 184, 4. Ro. 48^a.

Two suits, originally for the same cause, are brought i. e. pending at the same time between the same parties, yet if the action is brought for different things, the pendency of one, cannot abate the other - to wit of one & another - here an action of exclusion ^{an} the land, & a bill in chancery.

to postpone, may all be brought, & one must not state
the other because the objects of art of them are different.
1. Bore 47.

And a plea of the pendency of a former suit, for the
same cause is good, tho' the former suit is pending before
a different Ct^e because a suspension of every various every
action from an inferior Ct^e is a matter of convenience. 8 Re
6 L. 2. 44. 22. 4. 3 ac. 55. 1. Bore 47.

Under the last bar there is very little application of the R.
for there ^{are} very few countries where the Ct^s have concurrent ju-
risdiction.

And for the purpose of defeating the latter suit it is not suffi-
cient that the former suit be actually pending at the
time of filing a bill to the second. It is sufficient that it was
pending at the commencement of the second. The second
when commenced during the former, is always considered
as initiated ab initio. So suffering a new suit or
entering a billward, will not prevent the second from
abating. Technica Taciturne 10. 1. Bore 11.

A suit is considered as pending for the purpose from the filing
of the writ. Bore 41. 5. 48. Bore 142. 1. 48. 41.

Can. practice has introduced another qualification to the
R. for it has been decided that if the first suit is wholly
unsuccessful the pendency of it shall affect the second, tho' it
cannot be successful. A few instances where the first attempt
is by the first party, is found not to be the date, then the
file during the pendency of the suit when a second
action is taken. 1. Root 966. 562.

The English L. requires that the action should be commenced
- then suppose a better should bring the papers to the law
in which however only would lie. Now if the first should bring

to a second indictment. The reason is that the indictment has a description
any person & concludes only indictment. & they will search the
one or the other as they think best - but generally the last
1. 20. 2 Har. 140. 275. 352

But the case is different as to information. & if the
the attorney is prevented by some person from being able to have
no such contradictory indictment. & therefore the same applies
now as in civil actions. 1. Har. 140. 275.

If two different informations are exhibited the same day
by different persons for the same cause as the same indictment
not, each will abate the other; if no final judgment can be
rendered as either, neither of the parties can show any
prejudice for himself. Hence it is that the natural day has
no succession of time for this purpose - the day is perma-
nent state - & the indictment must show that one
was commenced before the other. Holt. 128. Mass. 665. 1. Com. 57. 512

17th The writs being unlawfully issued, or not duly authenti-
cated is good cause of abatement. & in 4. 10 is an immateriality
- so too is the informality of a writ. Thus if the writ is
under returnable or any other term, though the next one
is a day term of the court to which it is returnable, there being
sufficient time for a return, it is abatable - in fact
it is void. & so I suppose is here. But if there is a return for a longer
period, between the date of the writ & the next court, the writ
may be made returnable to the next court and once. 3. Will. 341.
Salk. 700. 4. Ba. 45. 1. Com. 45. 1. Root. 310. 16.

So if a writ is not signed by proper authority not only
voidable but absolutely void - & the officer is liable if
he sets under it - so also if the writ has no date, or any un-
popular one, as the 30th June - it is abatable, and in
fact the date must be returned - & the writ is void if it can't

non fugit must have proper numer. i. bon. 47 119. 123. 160.
bon. 187.

The latter has never applies to the b. l. - but in some cases action is different.

In bon. l. is immaterial when the cause is of a certain nature - the l. is that bon. l. action must be brought in the county where the plaintiff's debt was incurred & as counter-claim is a single suggestion, it must be in the same where the party lives. if this is not so the writ is abatable.

So also the plea is abatable that the action is misconceived as if cause is misconceived for debt. I think this applies only when the writ & the plea differ - for if they are the same bon. l. action 100 119. bon. 106. bon. 119. 123. 160. 187.

So also if the cause of action had not occurred at the time the writ was underwritten, this is cause of abt. this is true only in certain cases - not in debt & battery.

If an action is brought on a promissory note upon which the defendant is liable the action must also be taken in place to the action - because it goes to the merit of the plaintiff's claim - & where this defect appears by the pleadings advantage may be taken of it by demurrer or verdict. 2 Lev. 149. South 114. Holt 194.
Levy 101. 119. 123.

Rules as to the Place & Effect of Plea in abt.
 As to the place, the plea is usually locus & locus with power of the court as to the writ. & in those few cases where

it extends to the dictum, it begins & concludes with premises
 ing part of dictum. 9. 32. 94. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

This is not universal, for when the plea comes to the
 person of the plea, that he is a pure content to the plea
 then comes first, whether the plea ought to answer the
 plea's plea or dictum. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

But when the matter pleaded is action or extension,
 i.e., not apparent, the usual form is to conclude with
 premises part of the writ but not so long. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

And finally when the writ is abated de facto, i.e., when
 it would abate without plea, it concludes with premises
 part whether the it will proceed further. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

The character of a plea is so is decided by its conclusion -
 without reference to the substance or impression. This is
 a good & simple y. b. if it concludes in abt. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

But according to Do. Hall the beginning & conclusion to determine
 the nature of the plea - he says the plea must
 be pleaded in the first instance, still if it were & in in
 act to abt. but if it begins & end in bar to bar -

But if the subject matter would be good in law & it
 either begins or ends in law, the subject matter will
 govern & shall be a plea in bar. Upon the same prin-
 ciple as Do. Hall, there is a R. that if the subject matter
 is enough of abt. & it begins & ends in bar, to a plea in
 bar - but if it either begins or ends in abt. to a plea of
 abt., the subject matter will govern. So that the begin-
 ning & ending when alone determine the character of the
 plea - but when different the subject matter governs.

But this is almost too complicated for our merely
arbitrarily & unprincipled in principle. 2d Ray 99, 101 &
1. Moo 109. Barr 59, 132.

Again, if the subject of the plea would be good either
way, & the plea & conclusion are different, the par-
ty is, when to move may take it which way, he pleads
1. 2d Moo 281. 1. Inst. 36. 4. Barr 50. 3. 2d Ray 113. 59, 99, 107, 116.

And if a plea in abt is founded in matter that in
view only, is true - that which objects to right of action
can't go in abt - & on the other hand a plea in law
founded in matter of abt only is not good - for plea in
law goes to the right of remedy & not to the merit. 1. Barr
14. 40. 1. Inst. 124. 12. Moo 400.

And when matter to be pleaded will go either way,
the plea may plead either, tho the effect is different.
1. Moo 244. 4. Barr 50.

It is observed by 2d Coke that all pleas ever must, i. e. to
the action must be single or single i. e. not double, but he
says this don't hold in dilatory pleas - By this meant that
he must plead them in their proper time place & order.
The defendant may not plead two different pleas in abt, or an-
swer of abt of the same kind, to the whole or the same part
of the merit. But he may plead all the different kinds of
dilatory pleas successively in their order & place. 1. Barr
15. 1. Inst. 304.

But he can have but one plea to the action - for on
this judgt must go in chief. Barr 103. Holt 250. Com D. art 8. 3.

When a cause of abt is pleaded & judgt rendered upon it
upon his plea it as well as judgt in chief, but not
till after judgt in chief is rendered. But if matter of

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Reading

mere abt is not ~~pleaded~~ in abt tis no ground
of error & no advantage can be taken of it afterwards.
4. Bur 31. 2. Roll. 59. Hild 264. Ed. Ray 594.

And upon the principle of waiver it has been decided that
to a nine parties an judgment the deft is not allowed to plead
in abt any thing which he might have pleaded to the original
action Salk. 2. 2. Roll. 59. Bur. 2. 283. 278. 1. Inst. 909

A writ may be abated in part & give as to the remainder
the same as to a defect 2. Bos & P. 520. Larcen. 106

And in cases of this kind the deft may plead in abt as to
part, & as to the rest he may plead to the action Bur. 109.

As a plea in abt does not go regularly to the merits of the cause
a judgment under an such plea is in itself no bar to a subsequent
action for the same cause. But a judgment under an a plea
in bar is a bar to another action for the same cause. 4. Co.
49. C. 12. 4. Co. 97. 98. 1. Com. Dial. L. 4.

But when judgment goes in abt to the merits of an action tis
otherwise.

Judgment on Plea in Abt.

This if far different is that the writ be abated as quoted - 4. Co.
of Debit. 117. 1. Inst. 22. 1. Shaw 52.

But when judgment is rendered for ptt in the plea of abt tis
different in the two cases of a judgment and a demurrer to a plea
& as an issue in fact. If judgment on the plea in abt is given
in favor ptt an demurrer tis a dispositive answer. But the deft
answers once again - this is an interlocutory judgment 9. Co. 307. 396.
9. W. 467. 1. Bart. 562.

But if an issue in fact be joined on the plea, that is if the plea in abt is traversed & an issue in fact is joined (which may always be done when the matter is debatable) & issue is joined pro p[ar]t[is] - the judge will go in chief & will not refuse to let the p[ar]t[is] have judgment if the matter is to be determined by a jury which case see 2 W. 461 10 Mod. 82 1 East 334

But on indictments for capital offences the R. does hold that the judge is independent out of 2 Hawk 334.

If matter of abt merely is pleaded in bar, judgment in chief is intended for ~~the~~ p[ar]t[is] - for if the p[ar]t[is] will plead in bar he must take the consequences of the action 2 W. 102 1 East 334.

If the plea in abt is sufficient in l. & the allegation in it is true, the p[ar]t[is] may enter a confession habeas, i.e. pray that his own merit may be quashed. 2 Mod 99 1 Leon 166.

It is an invariable R. that the d[ef]t cannot demur in abt i.e. matter of abt in the writ is no cause of demurrer 1 Leon 166 10 Mod 99 1 East 334 & not to the writ. The R. means that the d[ef]t cannot demur to any defect in the writ - & if he does, judgment will go in chief the same as if he demurred to the d[ec]t[or]. Will. 410 179 12 Mod. 1 1 Thom. 12 1 Mod 99 1 Leon 99 not so.

But in case of indict^s for capital offences the R. is otherwise for judgment will not go in chief if the d[ef]t does demur to a plea or matter of fact. 2 Hawk 334.

After judgment of independent out of a second plea of abt cannot be allowed for if he could plead another in such as the same principle pleas an infinitum, for he would be in no danger. Habit 126 2 Leon 166

But when after judgment in favour of d[ef]t an plea in abt

Reading

the Plt amends his writ, the Def may plead in abt ³⁴⁹
now - for he now a new writ. Kebley.

It is a R of the English L that after a ly imparlance, the
Def can't plead in abt. unless the cause of abt. arises after
waiver an imparlance is the continuance of a cause
from one term to another. - 3. Bl. 216. 1. Ba. 9.

After a special imparlance he may plead in abt. for
this is now granted in such a way as to give the Def ad-
vantage of all exceptions. The ground of the R in case of
a ly imparlance is, that the Def receives a lt exception
that he can't be ld to receive an exception which did not
exist at the time of the act done - as if a person who is
sued & the person are imparlance - & afterwards re-ar-
rises she may plead her circumstance at the next term. no
9. Bl. 216. 1. Ba. 9. 4. Do. 22.

And the R for Plt in abt. is the same when the term
or R for Plt in abt. has expired (in four days from the
return of the writ) - In Bar Plas in abt. must be made
before the 4. lt. before the opening of the ct in the after-
noon of the second day of the term - In l. Plas all Plas
in abt. must be made before the unpacking of the jury
which takes place in the morning of the third day of
the ct. 1. Root 564. Stat. Bar 342.

Plas to the action or Plas in Bar.

A Plas in Bar is one which denies the Plt's right to recover.
Plas to the action are of two kinds - 1st the ly issue - this
is defined by Ed Coke to be a simple single material point.

spring out of the allegations of the parties, & consist-
ing singularly of an affirmative & negative. It consists
of an affirmation on one side & a negation on the other.
This is called the issue. 1. Inst. 12. Case D. Ry. R.

According to the strict R of C. L. there must be a di-
rect affirmation on one side & a direct negation on the
other. To prove an issue otherwise led to be argumenta-
tion & dog which is bad. Nor may it be proved by way
of implication. Certainly, is required more than in any
other composition. Thus if the pth affirms that J. S.
is dead & the dft that he is alive, this is not a direct
issue, tho if one is true the other must be false. 2. Inst. 219.
2. R. R. 1914. 7. C. R. 278.

If the pth denies his title, & affirms that he
has none in fee, & the dft says he has none in tail
his bad dog - for his no direct denial. But the strictness
of the R is somewhat relaxed in modern times, tho
not for the better. It has been decided that when one
pleads alienage & so he was born in France & the other
says he was born in Eng he has good issue - but he ought to
swear so he was not born in France. But I believe there
is no other similar case. 1. Wils 6. Str. 172.

There was one exception at C. L. to the R. in a writ of
right, the issue was always for two affirma-
tions. The affirmant says he has more right than
the other - & the tenant says he has a better right than the
affirmant. But this is not called precisely an issue.
but a main. 9. Bl. 301. Str. 1177.

But to always must refer to the issue according to the
strict R of C. L. - for otherwise it leads to argumenta-
tion & dog. & is always simple & easy. It requires nothing but the
adverb not joined to the pth's plea.

issuing out of the allegations of the parties & consisting negatively of an affirmation & negative. It consists of an affirmation on one side & a negative on the other. This is called the issue.

Issues in fact are of two kinds & Special & verbal. A verbal issue is called in the books the 4. issue as upon it depends an award. but this is the same as the 4. issue.

4. issue is the denial of all the material allegations in the Declar. & puts the p^{ty} upon the proof of them. It is so called because it denies them generally. 2. Bl. 209.

A special issue is one joined on a definite & particular count in the Declar. which may consist of any number of facts, each or all of which is necessary to support an action. & the Def. by denying a material point may defeat the action. This is good issue. For if he denies & defeats the grounds on which the p^{ty} rests his action he never necessary for the Def. to do this. For he may plead generally & deny all he would deny, under the 4. issue - this is often known as convenient. 2. Bl. 209. 122.

To all actions answering in debits are founded on misfeasances, not quitts is the 4. issue - to debit or misfeasance is not debit - To debit is of all misfeasances, non est factum. To debit on judgment is not debit - to an account or treasurership, non est factum - to action of assumpsit, non est factum - to action of plea - non est factum - to action of disseisin, non est factum - to action on recovery, non est factum. 2. Bl. 209. 122. 1. Bl. 209. 122. 1. Bl. 209. 122.

To debit on bond I have so that non est factum was the 4. issue - but if the Def. pleads debit, & the p^{ty} don't deny, he waives all exception of the 4. issue is it to deny

issue which he would have in not debt on simple count.
S. Inst. 54.

The one action to recover the sum at a final trial, the other
pleads not guilty - is a good plea - for in this case there was
implied count, that if a person does wrong, he is liable to
pay the sum at a final trial to the plaintiff - the implied
is the proper plea. S. Inst. 54. 2. Bro & 257. Ray 56.

It was formerly held that not guilty was a good plea to
assumpsit - because it was called true on the case which im-
plies a wrong - now it is otherwise - tho this is not a word
plea, & is added by verdict - yet it is bad on demurrer - the defect
is formal only. Str. 1024. Exp. D 167. 1 Lev 148.

As to the action of debt on simple count, not debt is the proper
plea to issue - But it has been held that in an action of
debt for rent, nothing in answer is good by issue, but is
the same as not debt. But in an action on bond or statute
not a good plea, for it does deny the execution of the
instrument - & as it is good in covenant broken for it
does deny that damages have been sustained by the plaintiff.
Barf. 544.

The plea of issue refers to the count or declaration and not to the writ. It
does not say plea to the action - if there is an action of account
the writ changes the object of being receiver of the plaintiff's
& the declaration changes him into being receiver of the plaintiff's
money of J. D. never receiver. But go to the writ but to the
declaration itself, & the plaintiff must prove that he was receiver
by the hands of J. D. Inst. 226. 4. Re 54.

Issue like all issues in fact regularly concludes to the count
i. e. to the jury. & is to be tried by jury. This R. however
is not universally true at b. l. for in many cases the judge
tries the issue in fact, as in case of trial by record. By

inspection as in the case of infancy or idocy - so the as-
sistance of an ecclesiastic is required to know if the parties
are married - so by wager of l & battle but now his
redress there is any other trial than by jury. But try a
fact very important in some cases (where there is a dis-
pute whether a criminal has had his trial) to know, that
the judges do try every issue in fact, thro the medium
or intervention of a jury, the same as they try a matter
of record, by the record itself. The jury ascertain & the judge
is try the fact. The doings of the jury are the same as
a record. 3. Bl. 313, 15. 1 Just. 126^a

Suppose the jury don't agree on a verdict & return the
papers - Now there has been no trial for the jury has
found no verdict - there has been no trial till a verdict
is found & accepted - so neither in law. 4. Bl. 313.

It is not an universal l that the l. issue concludes to the
country - for that of nil tuit success don't - but with a
multiplication. 2. Will. 13. 2. Bar & 1411. Law, 146. 8. 126.

As to the form of tendering an issue in fact
If the demand or denial is on the part of the Def., he
concludes thus - "If of this he put himself upon the coun-
try for trial" & if the denial comes from the plff, it con-
cludes thus "If this he swears away he engages off by the
country. 1 Just. 126. 3. Bl. 313.

This is tendering an issue or in other words the issue is
not joined - When therefore either party concludes to the
country he must add the similitur - i. e. he also concludes that
it shall be tried by the country or jury. 1. Bl. 313. 1 Just. 126.
The omission of the similitur in Eng has been deemed

is allowed to deny the commission of a crime as true & thus justify the act.

It is an universal rule that any defence which must be specially pleaded, may be given in evidence under the supra Bar stat.

The stat of limit may be given in evidence under the supra - this applies in tort as well as contr. To induce a verdict of acquittal it may be done in Eng & Bar 518. & Do 11.

It is to be observed that the stat of limit cannot be given in evidence under the supra, because it contradicts the plea - but this is not so under the Bar stat - this stat has almost banished the necessity of special pleading from the Bar. Bar 342. Smith 215. Dunlop 108. 2 H. 3158.

But on the other hand there are cases in which the act of the plaintiff may be given in evidence under the supra, thus it operates as a discharge - as a release in an action of breach of contract. Do Rey 566. Salk 274. Corpus 584.

The supra in apt does not necessarily mean that he is not now liable. Dunlop 108. 1 H. 3158.

Of Special Issue.

The object instead of pleading the supra may select any particular case based on allegation that is transmissible, going to the gist of the action, & then to the country & then to the remainder. This is a convenient method of forming an issue when there is a mixture of independent, i.e. distinct facts & then the supra issue. This is always safe when there are a number of facts, any of which is necessary to support the action. Do 11. Bar 342. Smith 215. Dunlop 108. 2 H. 3158.

thus suppose a covenant with the B. to pay him 1000^l. if he will write him a house or do some certain act. here there are two necessary points to be proved. 1st that he did receive - 2nd that the act has been done. Now the D. when well managed, deny any of the facts alleged, and so defeat the action of the p^lt^f and prove both. & answer to the other.

A p^lt^f plea amounting to a *q. ipse* is morally inadmissible, a special plea & a traverser are directly opposite - a p^lt^f plea admits the facts as stated, but alleges new matter in avoidance - a traverser denies some fact alleged the reason of the above is that if such a p^lt^f plea were admitted lawsuits run necessarily lengthen the record. & besides lawsuits tend to refer to the matters of fact which ought to go to the jury under the *q. ipse*. & *q. ipse* is a true. the D^lt^f pleader an alibi, it amounts to *q. ipse* - tis also a matter of fact & ought to go to the jury - to be sure if a release had been executed it should go to the J. - for they are to judge whether tis a sufficient defence. 5 Bar. 202. two b. 200. 2 C. 8. 327. Holt. 127. Exp. 916.

I have sd that a p^lt^f plea amounting to *q. ipse* is *q. ipse* in admittible - but to this B. there are 2 exceptions 1st A p^lt^f plea amounting to *q. ipse* is good if it contains a matter of justification - for this is matter of J. & ought to go to the J. & B. 100. 4. two b. 266. 5 Bar. 202.

2nd At B. L. in actions of *tres.* & *q. ipse* the D^lt^f may plead *q. ipse* what amounts to the *q. ipse* by giving colour to the p^lt^f's right - if he pleads title in his right he must be the *q. ipse* & no more. 3. B. 32.

The various cases amount to alleging some thing or not in favour of the p^lt^f's right, in order to justify an answer to it viz. a plea of *q. ipse* title i. e. a special plea

ment. 10 to 20. Ans. 8. 122. 9. B. 309. 2. Nov. 51. 126. 100.

And the judges may also allow a split plea in replevin which amounts to 4. ipse et tunc de rebus. This distinction however, is regulated by an established R. This R. is embraced by Habit & holds is this if the plea is of such a nature, i. e. if the facts pleaded are such as to show a principle in the law as the time there the judges may allow the matter to be splitly pleaded i. e. if so as to compare the plea with a question of L. that ought to go to the Ct. - but if it be merely allegation for the facts must go to the plea. Ans. 8. 122. 9. B. 309. 2. Nov. 51. 126. 100.

As to the manner of taking advantage of such plea some dispute has arisen - some say, the plea must be pleaded in the plea itself - but now we thus be consistent with the et power of allowing it discretion - for a discretion requires a judge in chief - others say, the plea must be pleaded in the plea itself - that the plea must be pleaded in the plea itself - but the plea must be pleaded in the plea itself - this I take to be the true R. if indeed the most reasonable. Ans. 8. 122. 9. B. 309. 2. Nov. 51. 126. 100.

But suppose the Ct. will not allow the plea on motion of the defendant will not yet plead by ipse - or enter a nil dict. but joins an answer - here I suppose the judge must over him on the discretion. So also after the Ct. has disallowed the plea of the defendant plea in discretion, the plea must be pleaded in the plea itself. Ans. 8. 122. 9. B. 309. 2. Nov. 51. 126. 100.

But there is a material difference between a split plea amounting to the plea itself - & a split plea allegation facts which in one would amount to the plea itself - for the latter is not one that unusually or of course amounts to the plea itself - ex. a plea of release an imple cont. this is quite different

It is to be thought that the plea should continue to the country for his master the King. And if it concluding with a verification would make it up a fact in the plea amounting to the issue of law, thus is a different kind of plea from the plea concluding with an *esset*. But a plea bearing any part of a fact the amounting to the issue is bad as to the continuing to the country in *How. 66. 1. 1. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.*

The plea that the mode of plea is advantageous to the plaintiff is arising from notice of the true defence & conspiracy is the end of the judge's attention to the particular facts stated in the plea.

This plea may be demurred to tho it conclude to the country for the conclusion is from facts and to a defence & whether his sufficiency or not ought to go to the court. This issue is the mode in the country etc. often frequently, tho it seems questionable since *1. 1. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.*

And in this case the mode in case of conspiracy is a plea which was well executed in form, but was by reason of something extraneous as conspiracy or not, rather as point facts as venue or intervention, the plea must stand with an *esset*. Hall says that all such pleas are not facts and are not pertinent, as they involve the answer. And in this *1. 1. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.*

Special Plea in Bar.

This is one which is not adverse to the allegations in the plea but avoids them by the matter alleged by the plea. Thus a plea that not that the plea is bad as to the country in *How. 66. 1. 1. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.*

It is not a plea in bar & plea in law, nor is it a material point in the dicta. Thus in *Tru. the Offt.* may plead a release as to part & traverse the rest. *Hald 108* b. 30. 418. 2. *Tru. 71*.

But a plea in bar does admit all immovable allegations which it does traverse & goes in avoidance of what it does admit. So the plea of release to do so has admitted the execution, but avoids it by the release. *Bar 108* b. 30. *Salk 11*.

Thus it is not strictly true in the case of an estoppel, for this plea does not strictly admit & avoid or deny the allegations. It shows that the party is in some state, and is not true or false, nor is it a plea in bar, nor is it a plea in law. This plea is a *non est* plea. *Wils 119* 9. *Bar 146* 2. *Tru 408*. *Bar 48*. 190. 140. 158. 161. 170.

Thus if it brings a real action in *R. & B.* pleads that it has not been for the same cause of action & in common law, this is a plea in bar of estoppel.

But this implied admission is not sufficient in all cases, for a plea of *non est* in *Tru.* that every plea of justification must directly confess the act intended to be justified. So when the *Offt.* was charged with driving cattle on the *Offt.* land, & he pleads that they were on the land, & that it was commonable - his *not guilty* plea for the thing justified is not the thing complained of. But I see no good reason for this. The plea is not directly explicit. *Bar 48* 1. *Tru. 408* 2. *Bar 146* 2. *Tru. 408* 2. *Salk 224* 4. *Tru. 408* 2.

A party may expressly admit what is in his favour & thus make it part of his case.

A plea in bar always avoids the matter *de novo*

It usually is the affirmative that runs up. So plea of
release is apt nullified & void. In case of negative answers
the way to plea is to plead negatively that he
has not done what he is committed to. 9. 36 909.

And as the plea advances now neither it must be made
outward with a manifestation, instead of closing to the
country - for as long as new matter is pleaded, in the
a proper plea is tendered, the assessor finally must have
a certainty of answering it in either of these ways
viz. either by denying them, or by answering to them, or
by confessing & avoiding them. This is the
established mode of keeping the plea open. 2. 158.
Barth. 575. Burr. 772 1725. Dancy. 58. 9. 31. 909. 10. 4. Ba 2. 17. 60.

There is indeed introduced into law by stat. 5. Geo. 11. a sort of
of plea to nullify, concluding to the country, the country
of apt matter. But the former is the 6. l. mode of
plea. Burr. 45. 224. 27.

But a plea that is merely in the negative need not
conclude with a formal manifestation - since the party
alleging is not bound to prove - & the plea can be kept
open without it. Wilk. Burr. 155.

That which forms a complete & proper plea must con-
clude to the country & not with a manifestation. In
cases where it is concluded with a manifestation, it would
be left open for other new matter - & in this way the plea
might run on. Ray. 76. Barth. 58. Burr. 145.

But when the plea alleges abstract apt matter, to
prevent parts of the matter he may conclude at his election
each with a manifestation or the whole with manifest.
312. 298. Barth. 43. 1. Burr. 338. notes.

Thus in debt an estate could the debt, plead payment, as to part, second satisfaction as to another part; & then, as to another part - as he may plead so he may cure these each with a satisfaction on the whole without

The plaintiff always takes the case, pro & con; & is to bring special plea admit what it does deny as a matter of course, & so of all pleas - hence no debt is not a good plea in debt now, for it admits the execution of the instrument, & advances nothing in answerance of the debt. Hardy 34.392. 4. Ra. 89.5.2.80 23. Hob. 218. Esp. 224. 2. Wils. 10. 2. Str. 906. Ed. Ray. 1800.

There are some by requisites to be observed in order to good plea. As to the first it is this, every debt must plead such a plea as is pertinent & proper, according to the quality of his case, estate, & interest i.e. he must plead a good plea this is the amount of it - But certain common discharges must be pleaded & then a special plea must contain something matter - because otherwise he not trouble for the other party could gain free on it - thus suppose an action on count the debt should plead that he was always ready to pay the debt with paying more - thing bad. 2. Wils. 238. 138.

And every plea which alleges more matter of law is bad - for it is not issuable & wants substance. So if the debt state say that a bond was not given in point of law, this is bad. 2. Wils. 238. 138.

And so too if the fact & law are inseparably blended. Thus in an action of trespass or trover for goods, the debt should plead that he was entitled to the goods of all persons, & that these were a felon's goods - here the point fact is bad for whether he was lawfully entitled to them or not, is a question of law - he should plead the special facts which show how far he is entitled to them. Baron 138.

2^d A very important R is that a plea in bar must answer the whole gravamen or cause of action. or be all for the whole. Thus if an action of ass^t & battery & wounding the D^f should justify the ass^t & battery the plea would be bad in toto - for the D^f is not allowed to select any kind of the D^f's & answer that only - for if he might answer he might answer any other - & so disturb with answering the whole. but he must answer the whole or none i. e. his plea must be as broad as the D^f's or it will be unavailing. bro. & 268. bro. D.R. 8.1.

So in case of a release pleaded in action of tre - this is bad without a traverse of all trespasses subsequent to the date of the release. So in case of a judgment he must traverse all trespasses before the date of the judgment. So if a license is pleaded the D^f must conclude without averre here as to all trespasses committed before & after the license. Holt. 104. 322. 1. T.R. 686. Lawr. 135. 1. Saunders 2. 8. note. 2 Do. 52. 127. 210 a & b.

Habit in an action as a bailor to whom goods are delivered to keep & to convey - the D^f pleads discharge as to conveying but this does not extend to the duty of keeping them. It is then found bad - so also in an action of slander. Holt. 24. bro. 1696. 2. Roll. ch. 414.

But it is not required by this R that the D^f should answer the whole gravamen in one plea - but he may plead one plea as to part & another as to the residue. In ass^t & battery the D^f pleads not guilty as to part & justification as to the residue - so may he answer a part pleads in bar as to part & answer as to the residue, but all taken together must be a complete answer as to the whole gravamen or cause of action. But there must be but one plea as to one & the same point, nor to the whole at all. if taken together. The same by R. holds also in all the subsequent Adgs. - so

the whole just or substance of a plea in law must be answered - so also the implication &c. 1. Saund. 28. vol. 1. tit. 40.

But with regard to pleas that don't answer the whole grievance, these distinctions should be observed. If the plea imports to be an answer to the whole, & is in law an answer to a part only, the plea should demur for its insufficiency for the whole. But if the plea imports as being an answer to a part only, as in *l. a. discontinuance*, & the plea should not demur but take judgment by a ~~discontinuance~~ not demur. As had been said it imports to answer part only, & the plea demurs he discontinuance his own action by accepting an insufficient plea.

The following case seems not to be settled - Thus suppose the defendant pleads a plea to a part which if pleaded to the whole would be good for the whole - Here the plaintiff thinks the plea should take judgment by not demur. 1. Saund. 28. vol. 1. tit. 40. 2. Lark. 172. B. Ray. 241. Str. 908. 4. Co. 12. 2. Bos. & P. 527.

But notwithstanding the preceding it is true that a justification, or any other defence that covers the gist of the action, the whole grievance & answers all matters of aggravation, is an answer to the whole defect. As in this case concerning & continuing the plea house & expelling him therefrom - a plea justifying the house & continuing is sufficient, for expelling him is aggravation, which the plea afterwards makes a novel argument in his justification.

A novel or new argument is defined to be answer for particular statement in the implication of something stated generally in the defect - as in the nature of a new defence. 1. Lark. 299. 1. Do. 636. 477. 1. H. Bb. 555. 1. Bl. 311. 3. Wh. 20. 1. Saund. 28. vol. 1. tit. 40.

Suppose the action began states in law. Now if the plaintiff wishes to rely on the expiration as a substantial argument of nonpayment he may put it, ~~however~~ in the replication by way of reconvenant. No this the defendant may find as to a debt i. e. if paid or not readily to him & in any other place which he might to better, if it has been the only thing in the debt. 9. East 294. 1. Cases. 165.
1. said in 297.

The report of the court must always contain an avowt that the two decrees are different i. e. other & separate from those mentioned in the plea in bar or other pleas. & this avowt in the replication can't be traversed - for the Deft should plead the 4th issue if not guilty. & then must let it appear in evidence that the trus. are different, the non assigment can't be supported, & the Deft will be still his master in the 4th issue. 1. Saund. 294. note. 2. Saund. 162. 296. 1. a. per

Chow continually increasing for the 10th. to 12th. South all the
particulars however numerous, of an extensive nature,
of the matter of the same. 1. List 300. & Co 194.

But now if they are sometimes allowed to run hither & - if the C. is as improved by books that when the particular is especially not south mounts me to superintending i.e. to great popularity - if they is allowed so where are we to let them performance of comments - the performing which must contain a great variety of facts - he may find an well as in case of shufflers. But at undiminished need - the fact is the Deputy is not ~~to~~ to allow performances especially of being at home or must serve frequently years - but he must find a number. Bro. E. 749. L.S.D. 215. 2. Hist. 256. L.S.D. 575. L.S.D. 606.

But this by line of performance sent in leads to an
action in Gov. where some comments are negative.

such commands can't be performed - there are commands not to do - so the plea should be that the deft has not seen the act, which he commands to do. 1. Inst. 302.

The performance of a material command is usually a formal defect. & no advantage can be taken of it, but in a special manner. 2. Inst. 242.

It is a G. R. that infugancy in a material point invalidates the plea. But never in an immaterial point. for his surplage merely.

Surplage is then either foreign matter or infugancy in an immaterial point. infugancy in this is no error. Learn what is in the difference between day & date. 2. Inst. 242. 9. 1. Inst. 202.

But infugancy in date is a material point. Thus suppose in an action of trover, the plf. should state in his declaration that on the first day of Nov. 1508, he lost his goods. & on the same day, ~~on the same day~~ the deft. found them. & on the first day of Oct. of the same year committed them - this would be ill on G. R. because, time is it caused by mistake.

But if the plf. had stated that he lost the goods found in Nov. & afterwards to wit in Oct. committed them this would be good after verdict for it would be regarded as mere surplage - the proper or after-ward matter for favour see Leams. 128. 145. 149. 161.

This is a denial of some particular point in the *plea*
& always tends an issue. it may be taken to embrace
of the *plea* including the *issue*. to any *sp* or *del*atory
plea or any *sp* matter at *issue*. but it can't be taken
to the *sp*. *issue* 1. *text*. 282. *plea* 285. 4. *ba*. 67.

It is obvious by *law* that who is ~~not~~ a *very* *commit* *man*
that who is *traverse* is *proced* by any *sp* *will*
be by way of *inducement*, to a *sp* *traverse* but I
conceive that this is not correct. ~~It is~~ *pro* frequently
a *sp* *traverse* is *proced* by *sp* *matter* of *inducement*. *ba*.
116. 117. 118.

A *traverse* proper by *itself* is usually taken with the
issue *aliquo* *hoc* & concludes *negatively* with a *manifestation*.
But *it* is in 4. *ba*. 67 where *it* is *properly* taken
it concludes with the *issue*. but this is *clearly* *incorrect*
- a *formal* *traverse* *don't* *necessarily* close the *issue* - but
traverse an *issue* with an *aliquo* *hoc* which is the *only*
form of a *technical* *traverse*, & *necessarily* concludes with
a *manifestation* - but a *manifestation* *necessarily* closes an *issue*
C. 40. 24. *law*. 121. *str* 876. *Rev*. 221. *Par* 412. 5. *ba*. 109.
1. *ba*. 109. 109. *note*.

They suppose the *sp* *plea* in *law* that *J. F.* *did* *rejoice*
in *plea* - the *implication* is that *he* *did* *rejoice* in *tail*, *gaps*
que *hoc* *he* *did* *rejoice* in *plea* with a *manifestation*. This is
a *formal* *technical* *traverse*; but this *traverse* *don't* *close*
I *much* *more* close the *issue* - it *only* *tends* *to* *it*. The *issue*
is then *formed* by the *sp* *rejoicing* *over*. that *J. F.* *did* *re*
rejoice in *plea* *in* *man*er & *form* as *he* *had* *before* *att*ended
in his *plea* in *law*.

The words *aliquo* *hoc* are words of *strong* *denial* in

the L. - but they are not indispensable to constitute a traverse - for tis settled that the words it non mittit do it - yet the former are commonly used. 1 James 22. 2. 1. R. 492. Barnes 119.

Alibi loci causa are words that infer to all that has been alleged on the other side. Barnes 14. 4. Co. 52.

In a *h. R.* a *sp. t.* that is a technical traverse, concludes with a *verdict* - but a *h. traverse* that reaches the whole that has been stated on the other side concludes negatively to the country. Thus from the implication of *impugnatio* &c. the conclusion is to the country. *Sp. t.* in an action as *sp. t. & battery* pleads some assault done. There is a *h. traverse* going to all this where & in these words, "*de sua propria injuria alibi loci causa*", there is a *h. traverse* of the whole to *Depress* pleaded. Barnes 152. 2. Bar. 12. 4. Doug. 90. Salk. 4. 2. 1. 43. 1. 1. Bar. 4. 2. 76. Doug. 412. 4. Co. 67. 7. Mod. 105.

But why is this difference between the conclusion of a special traverse which is a *verdict*, & a *h. traverse* which is to the country. A *sp. t.* traverse ought to conclude with a *verdict* for two reasons 1st, it may be an immaterial point, & if so the adverse party ought not to be bound by it to join in it - because the judges should be left at liberty that the party on whom the issue was made might abandon it on good reasons & it ought not to conclude to the country. 2nd in certain cases when the traverse is material the adverse party may pass it by altogether, & take a *traverse* himself, the inducement which he could not do if it concluded to the country - hence a *sp. t.* traverse should conclude with a *verdict*.

But in the case of a *h. traverse* it certainly cannot be

alleging some new matter & conclude with a technical
conclusion

But it is unnecessary to allege new matter the plea may
reply that there is no new matter & conclude directly to the
country. So this technical manner differs from a direct
of position direct in form - it differs also in the conclusion
for it must conclude to the country, where a technical
concludes with a manifestation. Thus in a plea of assumpsit
replication a good & lawful consideration abque hoc
that there was corruptly agreed (stating the consideration)
do with a manifestation

But the plea is not bound to state the consideration
- but may positively deny by saying that there was no con-
sideration agreed & then state to the country. If he state the
first mode he must conclude with a manifestation. In
case of the new matter alleged in stating a new con-
sideration - 2. Ba 92. 4. Do. 67. 77. Ray 14. Bur. 1028. 921
1. 1. 499. Linnell 6. 157.

The mode of traversing a particular fact by way of pos-
ition & direct denial, obtains only when some other answer
is given to the issue of what is alleged on the other
side. It has been a subject of much controversy in the
books whether a wrong conclusion in these cases is mat-
ter of substance or form.

In a plea of assumpsit should conclude to the country. Now sup-
pose a plea of assumpsit is made to conclude to the
country should conclude with a manifestation, is this a de-
fect in form or substance - Ray says it is a defect in form
- in others the it must be stated that there was a
form or substance is, whether it is ill on 4. or 5. See
Ray 24. 1. 240. 1. 117. 1. 1. 63. 2. Do. 140. 1. Do. 245.
Linnell 2. Mod 60.

It is not objected to this conclusion, that enough has not been
 to i.e. that he has not traversed all that is necessary, and
 only that he has not in a right manner - this merely is
 from thus the spot stands what is sufficient in a technical
 way, this is only a formal defect & is all out of the
 manner.

There are 2 ways of denying an allegation 1st by a techni-
 cal law. & 2nd by way of positive & direct denial. Further
 when an allegation on one side is expressed, then on the
 other by way of pos. & direct denial, a formal law is required
 is needless, improper & unnecessary. for if permitted the par-
 ties might argue & have an impertinence - On the other
 hand one should conclude to the contrary, & the 8th Law.
 10. Co. E. 355. 1. that 10. Ray. 16.

This part of the by nature of law with its construction
 - now is to understand when to take a traverse is nec-
 essary - This is a by it. when one party alleges unusual
 in which is inconsistent with any of the conditions al-
 legations on the other side, but which does form in fact
 a law. of those allegations is necessary. Thus if the 1st
 pleads that J. S. did ride in p^{re} & the 2nd replies that he
 did ride in p^{re} tail - this is bad p^{re} - a negative plea and
 joined - he should have pleaded that he did ride in tail
 alique hoc that he did ride in p^{re}. So if one pleads that
 his codger died before the date of the will - & the 2nd re-
 plies that he was alive here also a traverse of his death is ne-
 cessary. Dyer 265. Co. E. 30. 1. 11. 259. 10. 10. 11. 12. 13.

This new matter which precedes the traverse is called the
 inducement to it. Thus the 1st pleads that J. S. did ride
 in p^{re} - alique hoc that he did ride in tail - the new matter
 preceding the traverse is the inducement - that which follows
 is the law itself.

The object of the last is to compel the parties to go on and give up what each alleges, inconsistent with what has preceded. But the 1st that there must be a denial & denial, i.e. that there must be a negative affirming him & negative is not unusual & has been in use in modern times. The 1st affirms in his denial that J. D. was born in Burg. the 2^d pleads that he was born in France. The 1st held this plea to be sufficient. So in debt on a billia was void if the 2^d pleads no award, the 1st may reply an award, & assign the breach & need not traverse the plea. Lamer 180.

But a 1st like this seems to be said down by the 1st that where that which is affirmatively alleged on one side, is so inconsistent with what is affirmatively alleged on the other that the point can in no way be true, his is sufficient whether there is any direct affirm. General answer - but this is a deviation from the strictness of pleading & introduces a contrariety which is much to be lamented. 1. 1. Wils 6. Str. 1177.

This by B. (that where the party introduces unavowedly new matter inconsistent with the allegation on the other side a traverse must be superadded) does not hold where the party who alleges this inconsistent matter takes the burden of proof on himself i.e. where he alleges some affirmative matter which he is bound to prove in the plain manner in which he laid. Lamer 180. 181.

But when a party merely confesses & denies what is alleged on the other side his new matter is not in issue. As in the 2^d plea. When after the cause of action is over - saying that towns obtained he pleads he can't traverse the fact that he was entered there - for he has simply & fully admitted it - but in this case the reply as it concerns new matter must conclude with a negation with

ant a war 9. B. 304. lino. 221. & Chas. 164. & Ba 40

When a promise was given with an abt. (2) with a limitation or condition the issue is joined by the opposite parties affirming, one subject is thus transposed & coming to the contrary. Thus the 1st sup^{er} plus that J. did mine in Dr. B. 1. l. 1. h. 126^a lino. 149.

It is true then that to an issue by the opposite parties affirming one subject the abt. does run.

What is meant by Dr. B. 1. l. 1. h. 126^a lino. 149. that an issue joined by an abt. ought to have an affirm. after it? is it not that a man cannot be warranted by an abt. h. 126^a lino. 149. & Ba 6th note.

The meaning of the A. is that a man cannot be warranted by an abt. & for the word abt. and a strong neg.

If the 1st in transposing the 1st tells, shows in his inducement a defect in himself, that is a defect in defence his A. is too. This is only an example under a G. R. of p. 1. before stated, that where a party shows in himself no good defence he cannot support it then extend to one inducement to a law. h. 126^a lino. 149.

It is a G. R. that there could be a war upon a law by this is meant that when one of the parties has tendered a material law the other parties must know it, & tender another upon the inducement to the same point i. e. to the same identical ground of defence or claim he must save in the material law first tendered. & by the 1st p. 1. h. 126^a lino. 149. that J. did mine in Dr. B. 1. l. 1. h. 126^a lino. 149. was said in tail, abt. he did mine in Dr. B. 1. l. 1. h. 126^a lino. 149. must save & cannot trans. the mine in tail, for in the same law must save.

implication - so in an action on debt, the D^t pleads a corrupt agreement - the P^t replies that there is a good & lawful consideration, stating what it was without this was a corrupt agreement - but the inducement & the true state be the same point - viz that there is no money - now he is incompetent for the D^t to say that there was not a corrupt agreement &c. he should join in the travers & conclude to the contrary. 1 H. 31403. Barne v. C. 17. Holt. 104. 1. Inst. 281

But a travers after a travers is good tho the first travers is non minus. Holt. 103. 1. Inst. 282. Rep. 101.

The distinction between a travers upon a travers & a travers after a travers is very important - tho difficult to be understood (this last is one that does not go to the same point on ground of defence that is embraced by the first travers thus in an action of debt the D^t pleads a release & traverses all the travers after the release given - now the P^t may traverse the release - the D^t comes all the time before the date of the date of the writ - the P^t may deny that he executed the writ or join in the travers. The release is the inducement to the travers.

If the P^t denies the execution of the release, he traverses the D^t inducement to the travers & this is a travers after a travers. If the D^t pleads a possession he must traverse all travers commencing before the date of the possession.

If the D^t pleads a license he must traverse all travers commencing both before & after the license given - this is done tho the plea may be countermin with the D^t.

But suppose the D^t had no license then if the P^t is not allowed to traverse the fact of a license he will be tripped out of his right - therefore he may traverse this

infinitum - so in an action on contract the ~~defendant~~ ^{plaintiff} pleads that
 there is a contract & a breach - this there is a breach after a breach
 because it does not go to the same point.

How far & why can a breach be a breach be allowed?
 If a breach on one side goes to the same point as that offered
 by other why not join? In ~~the~~ ^{the} don't allow a possibility
 of plea in infinitum, as would be the case if this were
 allowed.

To this I however there are two exceptions. 1st When
 the point in issue is upon an immaterial point, it may be
 be abandoned & another tendered on a material point - because
 the point in issue would decide the suit the adverse party may
 abandon it - indeed he is not bound to join in immaterial
 issues. It may be deemed to do so for immaterial
 issues - But this does not is a breach upon a breach - for it goes
 to the self same point i.e. the self same amount of damage.
Holt. 104. 1. Inst. 242^o. Benth. 116. Bro & W. 1 H. R. 976 406
1. Bound. 29 note.

E.g. The plaintiff declares that the defendant sold him timber
 an action of waste - the defendant pleads that he sold them for
 pain & did not know them ~~at~~ ^{at} he sold them - this is immaterial -
 for if he did not sell them he is not excused of course
 the inducement to the breach is material & therefore the
 plaintiff may reply that he let them not ~~at~~ ^{at} that he sold
 them that he delivered them in repairs - here the plaintiff is
 not bound to tender a new transaction the former transaction
 for he may demand if he chooses.

2nd When the two tries to have been committed in the
 county of A in which the action is brought, the ~~defendant~~ ^{plaintiff}
 pleads a local jurisdiction - that transaction committed in the
 county of B - with an abode that transaction committed in the

case in which it can be made, & the reason is that matter of inducement is seldom material but when material it may be traversed. Thus when the p[er]t in an action of slander declares that whereas he lookt with upon the mayor of London & the said may was an infamous person he can not but be sure that gives the p[er]t his weight of action & is traversable, *trio. 2. 168. Lamer. 148.*

When a party justifies an offence, & avoids a, to a part only of the material allegations on the other side, he must need be contented with the residue or part not avoided. *Mott 104. Esp. 113. Lulk. 222. two 687.*

So in case of the d[ef]t pleads a justification, of what particular only all true or true, he must leave those material to the p[ro]p[er]ment in order to cover the whole transaction. As if the d[ef]t pleads a license at a particular time he must leave all true or both before & after that date. the more good for may is to fit the d[ef]t as to the part not avoided. *Id. 297 2. 104. 68.*

If the d[ef]t pleads justification at a particular time, he must leave his liability at any other time.

There is an exception to this & is when the justification is laid on the Sunday on which the trespass was committed. the day being agreed on by the parties. & the trespass justified & that constitutes a full discharge in the plea. & so no need of a traverse to prove any other plea & covers the whole transaction without any addition or more. But suppose the p[er]t has laid the trespass on a Sunday day (as he may) & the d[ef]t pleads a release on that day. & the p[er]t has really need for trespass committed on another day or on one other would suppose the trespass is laid to have been committed on a day & denies at another day. it seems that a justification on the day certain is sufficient.

ptly must in his replication make a nov. assert. ann
ing the allegation viz. that the two par which he
actually sees & complains was committed on such a day.
1. T. R. 636. 1. Bull. 138. 2. Saunders 5 a. b. 1. Salt. 1. Ray. 86.
R. A. 1. 17. 4. Ba. 125. 9. R. 911.

Transposing before & after the day on which the par
ticular is done, is not necessary it seems if the acts
which the deft justifies are coming to be the same as
those complained of. This if the 6. practice in law - as if
in law a house on a particular day should be placed
at 6. R. he must show all antecedent & subsequent law. c.
- but with us this is not required - if he comes in his
plea that the two complaints of are one & the same
with the those justifies - & all comes to be the same this pro
tion is admitted in 6. - tho this is questioned in some books
1. Bull. 138. Salt. 64. Hawk. 161. 9. L. 277. 1. Saunders 14. 2. Do. 5 a. b.

bautin. 1. Vent. 184. 2. Keb. 78 5 Ba. 207.

Another Ray pldg is that a lease must consist of ipse
sue matter - so also must the inducement.

Unnecessarily, a lease or indent must mention the terms of
the allegations transposed - but this mode is not always
right - will sometimes lead to a very pregnant 1. Saunders 168. 9
1. Chert. 126. 303. 5. Ba. 201. 2. Do 78 1. Ray. 86. 1. Hawk. 196. 2. Do 125.

6. 6. 6. action of law the deft pleads a release since the
date of the writ - the implication is not his act &
did since the date &c.

So in an action of debt on bond, paid at or before a
certain day - the deft pleads paid before the day - the plf
cant show in this words, "that he did not pay before the
day" for this expression would be immaterial - & therefore a

operation for it - he should turn out before, at, or after
the hour, & call out as I did 17.

This a neg. photograph & not a print as the same as a
neg. as appears from ant. 4. B. 28.

The pth should have been there not his and in
manus & form etc.

The vitaman is, that when, however, in the course of the allegations, if it leads to a verdict, then in propos - but when it does the time may be lost -
Rev. 934. 2. Wills 179. 4. Ba. 66

The word is usually pallorized by the words *idea* & *perma* as *allogot* - but these words are in l. rather common - tho the *pha* may be so construed as to make them matter of substance - *Perma* gave them an unmeaning & swarming without there is good. Lam. 126

A. lives not in the terms of the allegation is only ill
on sp^t demand - i. e. It is a neg. argument is based only
on sp^t demand - the ill in former arg. 4. Bu. 18. was
87-316.

Of Duplicities

A double plea is one consisting of several distinct & independent material allegations to the same point & requiring different answers. By the same point is here meant the same ground of law as in me. 1. Inst 203^d 205th. 9. Bk. 211. 5. Bk. 26. 65. Holt. 295. 4. Bk. 118.

If an infant should plead infancy & form as a defense to the main claim towards his duplicity, for these reasons

require different answers. Edm. 27. 102. 4.

But giving different answers to different parts of the same matter or plea does not constitute duplicity. For one part may be true & another false one sufficient & one insufficient in so one may be deemed to & the other avoided by new matter otherwise if each extends to the whole Co. 304. 4. 318. 11.

So in same case the Stat may plea the 4. if one have a 4th plea to another & answer to a third. 2. Be. 11619
1. Inst. 304.

So also at L. if there are several pleas, each may plead a single matter to the whole or various matters as answer to different parts - namely as if the had been read alone - since the R otherwise they would be at the answer of each other. Wald. 70. Stra. 1150. 610. Barnes 132. 10. Reg. 1372
Exp. 514. 15. 17. 20.

Duplicity is a fault because it tends to unnecessary prolixity - to confusion in pleading different matters - & to vexation when costs are taxed in a great measure according to the length of the records besides are defence if good, answer the same purpose as an hundred. 2. Be. 116. yelv. 14.
1. Inst. 47.

Every plea must be entire simple connected & confined to one point - i.e. a single ground of action. 2. 34. 311.

In last R however is rather deductive than imperative for tho a plea is not connected tis not demurrable - by extension & confined to a single point is nearest single

But a defence may consist of more than one fact for a number of facts are often necessary to establish a

single ground or charge. These facts however must not go to different grounds of claim or defence as in Baron & Hume. So if second & rat. is pleaded to satisfaction to all the facts which support it - so in an answer being pleaded, a great number of facts are necessary. Bar. 420. 4. Ba. 6th

Amplification never constitutes duplicity. So if there are two grounds of defence & one of them is immaterial & not material, this is not duplicity. So in if the plaintiff pleads the insufficiency, or if a release is pleaded the rest by law then the plaintiff is insufficient. Hibb. 661. Reg. 42. 4. Ba. 109.

As to protesting when two pleas are pleaded with leave. Bar. 1022.

Of Duplicity in the Plea

This counts in joining causes of action that cannot be joined to inform and right of recovery. E.g. bond & tort - and arising ex contractu & delicto - then are distinct & unnecessary grounds of claim suited to inform and right of recovery. So if the plaintiff should declare as a count & allege that the defendant had conspired with a third person to defraud the plaintiff & for this reason the recovery had not been paid - this would be duplicity. Bar. 614. 2. 1. Bart. 465.

So in debt can void the agreement in the relation of more than one breach is duplicity at law. This is unnecessary - for one breach of a joint bond is a total breach of the bond. Bar. 134. 981. 2. Bart. 124. 2. Wills. 269. Law. 15. 6. 2. 1. Roll. 112. 2. Same 377. 5. Case. 1.

The stat. 8 N. 2. W. 3. has provided that in actions in the nature of debt, the plaintiff shall recover what is equitably due of course to satisfaction to assign all the monies for the

with money only pay the damages incurred by the breacher of right. This stat. is limited by the constitution to all bonds.

But in actions of covenant broken, the p^lty may assign as many breaches as he pleases - thus he might do at C. B. Indeed they not only may, but must be assigned - the action in this case is brought to measure the actual damages sustained. 4. Bac. 191. 2. Samsd 397 5. Barn. 36.

The case the A in debt are bound is the same as the English A. as to actions of covenants broken - no reason is incurred than the actual damages sustained.

By the stat. 4. & 5. Anne the p^lty with the leave of the p^lty as many defenses to one action as he pleases. The leave of it is granted of course.

Still such defenses are illegal in distinct pleas. This stat. was made to remove the embarrassment which often accrued in p^lty the best of several defenses. Harmer. 278.
4. Ba. 122.

This stat. intends however only to remove to the p^lty as there can never be two duplications to one plea, or two rejoinders to one replication. By the A. more often than the p^lty would be unnecessarily explicated. Valt. 10.
4. Ba. 9. 113. 121. 194. Lewis 192. 3 Barn. 216. 5. Barn. 36. 65. Salt 212. 678.
Id. Ray. 372. 428. 3. Lew. 46. 2. Mod. 271. Bro. C. 15. 20. 1. Will. 219.

Duplicity is a defect in form only - hence, advantage can be taken of it only by apt disclaimer. There is too much substance since the defect cannot be reached by general disclaimer.

Pleading

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The party answering must point out the particular
duplication - he is supposed to say no doubt & wants favor
4. Bo. 2. Salk. 219. 67b. Ed. Ray. 732. 733. 1. Wl. 219.

But this must be as to taking advantage of defect, & not
apply when the pt. joins in one of the distinct grounds
of action - here the defect is incurable - as a misjoinder
of actions & is much more than duplicity, 6. L. 1st &
batry. & sur. Hornb. 233. Salk. 10. Ray 293. 1. Lew. 99. 1. O.
R. 275. 4. Bo. 11. 5. R. 4. 77.

Of Proport & Oyer.

This is a L. R. of C. C. that when a party declares as on
plead ad & makes title under it he must make pro-
port of it i. e. he must aver that he brings it into the
proport. in curia bon. D. Ry. 2. Bl. afo. 22.

This must be done that the adverse party may have
aver of it, & a copy if he pleases - aver of an instrument
is to have it read, 5. bon. 12b. Lamin 90. 4. Bo. 102. 14. 6. Co. 98.
Holt. 293. 10. Co. 93.

Without aver if oyer is necessary, the adverse party is
not bound to plead - but if he does he waives it &
can't demand it afterwards. 6. Mod. 284. 7. Salk. 119
4. Bo. 113.

In eng he is unnecessary to make proport of a pro-
missory note on bill of ex - for they are only one & a
provision - the proverty is declared upon & not the note
Whitth. 185. R. 249.

But in con. promissory notes are due. Vrs are all
unrated writings, & so to be treated - there are no pro-

may be made as at any state after demand.

But the unnecessary to plead unexecuted instruments unless they are contrary. See N. by promissory note are rendered by affirming a real.

If a man a right acquired by deed with deed without deed, the parties claiming is not obliged to plead the deed. & of course a prospect is unnecessary for he should to make his point of what is not pleadable.

So in England an assignment of a lease by parol is good - so it is by deed - but still it need not be pleaded - so no prospect is necessary - even tho he were bound by contract to assign without a deed.

And if it could pass unless by deed - then the deed must be pleaded & prospect made. See by Indenture of a lease which must be pleaded & prospect made Bro. 6. 143. Tithe 459. 4. Re. 116. 2. Mod. 64.

So a D. & return. 6. Bro. 142. 2. L. R. 117. 9. T. R. 156. Bro. 6. 149.

But tho the right wants pass without deed still if the deed is pleaded, & the title made under it, prospect must be made. 2. Mod. 64.

But tho a deed is pleaded, if the party does not make title of it - he is not bound to make a prospect.

So if his own matter of inducement prospect need not be made - it does go to the point of title & can be traversed. So he is not necessary in order to make the opposite party to make an appropriate defence - for the defence must be in answer to the gravamen or cause of action. 6. Bro. 94.

Reading

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A stranger to a deed may plead it without making his
 first of it - the reason is he is not always in his power to do
 it. He may indeed compel the other party to make a plea
 it by a subpoena duces tecum. 1 Lev. 43. 1 Show 418. 1 And 159.
4. Br. 111. 1 Inst. 394. 10. Co. 75. 1. Ro. 74. 1. Mo. 151.

And a person who acquires title by a purchase of a person
 another who claimed by deed, need not make proof
 so of a tenant in dower - for she is presumed not to have
 it in her power. 1 Inst. 225. 5. Co. 75. 1. And 305.

But to the 4th last said dower there is one exception in case
 of a tenant by the curtesy - for he is deemed to have possession
 of his W. d. & may retain them during life - but the
 W. is not supposed to have her W. d. - they are in his hands
Mo. 1146. 1. W. 16. 2. 1. R. 289. 10. Litt 226. 2. 10. Co. 74.
2. Root 482. 4. Br. 110.

A widow may be pleaded without making proof - for
 records are kept in some particular places & are not allowed
 to be moved about. C. 1. R. 74. 5. 9. Co. 151.

But be it that when the widow is in the name of return
 the cause is, her necessity to point out the members of the
 roll, so that the opposite party may easily find it. 1. Inst.
225. 1. R. 74. 5. 9. Co. 151. 1. And 305.

But notice to the person to whom the deed was made must
 be made a deed with a proof, when it would be necessary for
 the party having it to do so, so can he at a claiming under
 his father's deed must do it. 1. Inst. 267. 917. 10. Co. 72. 4.

If the deed is lost by time & accident, or destroyed by casualty as by
 fire, it may be pleaded without proof - so also if it is in possession of the
 adverse party, when it belongs to the other party. Yet the ma-

you for omitting the prospect in these cases must be sta-
 ted in the Pleading, especially, otherwise they are demurrable.
 5. Co. 75. 85. 1. Will. 11. 1. Howard 9. 11. 1186. 9. 1. R. 151. 2. 11. 11. 269.
 1. Root 541. 2. Co 482.

If in these cases he pleads with prospect he will be conde-
 mned by it - he can't contradict in law - & if he makes pro-
 spect the opposite party has a right to say - so he can't
 proceed at all - and the plea must be amended. 1. 1. R. 885.
 1. Howard 9. 1. Will. 11.

When the deed is only inducement to the action & if conve-
 nient is not made under it - prospect need not be made - nor
 indeed does the R. - quin it. 4. 1. R. 579. 6. Co. 98. 11. Co. 11.

But it has long been settled in law that prospect is not
 necessary, but says it is demandable without it.

It is the omission of prospect when there is no party who
 matters of substance - & not aided by verdict. But now by
 stat 16. 8. 11. Car. 11 & 18. which are the great statute of
 this induced to a new matter of justice & can be
 taken advantage of only by the defendant - so he aided by ver-
 dict. Pleading also 4. 1. R. 575. 10. Co. 92. 6. Co. 38. 1. Co. 492. 1. Co. 621.
 1. Holt 907. 4. R. 119.

But, if the deed is lost or destroyed & pleaded without, pro-
 a copy must be made; or even found void of its contents - admissi-
 ble. But it must first be made to appear probable to the
 Ct, that there is a copy - for then the party will always
 keep the best evidence in the deed itself, out of the way by
 alleging a false deed. In many cases the fact is not
 of the loss of it is unalterable - so it is necessary only
 to make it appear probable. 1. R. 791. 1. Atk. 446.
 1. Blitt. 205. 6.

Pleading 991

The same end is admitted when the deed is in the hands of the opposite party, unless he is quitted him to produce it. 1. Bart. R. 50. 2. B. 165. Chitt. 206.

When proof is made the adverse party may challenge. w. 4. B. 114. 2. R. 299. Law. 96.

He is entitled ^{to} to a copy of it at his expense. Holt. 217. 4. B. 114.

But aye is not demandable of a record, when the adverse party makes proof of it. 1. R. 149. 4. B. 114.

So if proof of a deed is made when not necessary aye is not demandable.

The object of proof is to enable the parties to plead an answer what is alleged on the other side. But if title is not made under it then he is not bound to answer the mere surplusage. Edd. 522. Salk. 593. 1. W. 995. Doug. 476. Law. 97.

Granting aye when unnecessary does no injury, but in proving it when demandable, is an error; for the party is deprived of his defence. Law. 97. Salk. 493. 1. S. 92.

When aye is granted the party demanding it runs into the whole deed voluntarily on the record & takes advantage of any thing omitted by the party who pleaded it, or of any thing which appears on the record. So if there was a condition the performance of which was to save the party from the penalty of the bond he was placed in performance. But frequently all that is necessary is to spread it on the record & then demand for it. There is a variance if the instrument counted upon is different from the one on record. 6. Mod. 28. Law. 98. 3. R. 299.

As a G. R. that if the instrument is insufficient in L. to support the action or defence, or if on the face of it, it is illegal, it may be struck out the record & then dismissed to - but if not insufficient or illegal on the face of it, the fact must be made out by argument, & not dismissed to 2. Plur. 349. Lawr. 99.

So if in an action on penal bond it appears on the face of it or from the conditions that there given for an illegal consideration, it is bad on the face of it & may be dismissed to - But if the consideration is not explained, the party can't dismiss, but must show the illegality of it by argument.

If a deed or instrument is fairly recited by the party, after examining over of it, the adverse party may sign judgment for want of plea or process it to be entered in his recitation by the officer of the Ct & then dismissed. 4 Re. 370. Bancr. 301. 2. Re. 299. Lawr. 98. 2. C. Mod. 24.

By falsely reciting it he is guilty of a breach of trust - is a violation of his implied engagement, to give it to the Ct fairly, therefore his plea stands, for nothing & is treated as a nullity, & judgment taken by the Ct. had not pleaded. Lawr. 100. Land. 9th 16. 17. 4. T. R. 470.

Of Departure in Plea.

This is a demerison or abandonment or departure from a former defence or claim for another that is distinct from it & not tending to fortify it.

The allegations of each party in the successive stages of an action should fortify all the former pleas - so the replication should fortify the defence the rejoinder the

plea. Ray 22. Ho. 442. B. N. P. 171. 5. Bam. 99. 129. Ed. Ray 459. 4. Bo.
129. 9. Al. 910. 1. Bur. 209. 2. H. Al. 282.

So if plaintiff in plea be pleued in bar, and in rejoinder he alleges a gift in tail, tis a departure - for the latter is not a fee simple estate, nor is it by plaintiff. So if the 1st pleads injury, replication necessary, rejoinder likewise, tis a departure. 3. Bl. 310. New 2^d. 105. 1. Inst. 209. 4. Str. 522. B. N. P. 12.

So in action of commandment livery, the deller alleges the plaintiff once off a condition precedent - the non performance - viz. the plaintiff was ready to perform, but the 1st refused to let him - this is a departure. But if one pleads a denial of the other that twice repeated - a replication that it has been received is not a departure - for it fortifies the first ground. 4. Bac. 124. 1. Lev. 21. 2. Do. 48. 1. H. bl. 376. 469. 512.

But when the cause of action is alleged generally & the 1st pleads warranty, a more particular statement by way of non assignment is not a departure. So if in the action of livery the 1st justifies one livery on a certain day & says that tis the same as in the deller, the plaintiff may reply notwithstanding a livery on a different day, or a different livery on a different part of the same day with more precise warranty, & never it to be different from the one justified.

Indeed a non assign. may be construed so as to raise a departure - the plaintiff may merely assign with or without taking issue on the plea. Story 529. Bam. 230. 2. H. 20. 1. H. 28. B. N. P. 17. Bam. 164. 5. 3. Bl. 311.

Departure is a substantial fault & matches by l. de p. in v. in one vol. Bam. says tis matched only by 1st

A demurrer confesses an averment that contradicts what before appears to be on the record. Hence allegations that appear contrary, to what the record shows are themselves a cause of answer. As if he pleads a record & then contradicts what is contained therein. A demurrer does not confess the facts he has no right to do. ye. 9. law.
124. bro. 8. 25. Law. 164.

On the same principle an averment never confessed by a demurrer, which is impossible & that appears so on the face of the record.

So in an action of trespass for taking beasts in the county of A, if the defendant alleges to have taken place in the county of B. a demurrer does not confess this to be true, for it is impossible that the county of A can be in the county of B. 1. Sid. 10. Law. 8. P. 6.

Nor does it admit facts which on the record appear incapable of proof. Indeed he is incompetent for the party to aver that which cannot be proved. So if one pleads a record to have, a demurrer does not confess it - for a record must be proved by writing. ye. 1. 2. 4. 6. 3. 11. 4. 6. 5. 5.
bro. 8. 25. Law. 46.

It does not confess allegations that are not material or too remote. Salk. 561. Law. 164.

Such allegations cannot be demurred to in any form - but a party demurring ought to be liable to confess that he cannot prove. Salk. 561. Law. 164.

It does not admit the truth of instruments or immaterial averments. 4. Re. 131. Salk. 561.

It never admits mere conclusions of law made by the ad.

Reading
 some points from the fact state - fact. are deemed to
 & not matter of L. Habit. 56. 9. Ab. 219. 4. (Ba. 54. 129).
 1. Inst. 126.

After an issue of fact joined, a dem. can't be taken it must
 be while the pleas are open, & before issue joined - for this
 prevents further story, or demurrer - an issue joined closes the
 story. Ba. 2. P. 6. 1. Shaw 219.

A dem. is g. ly called an issue in L. - but this is not
 strictly correct - it rather tends an issue in L. - the issue
 not being closed till the party demurs upon, joins in the
 demurrer. 9. Ab. 319. 14. 15. 1. Inst. 126^a 4. Ba. 129. 54.
Lamer. 44.

If there is a dem. & an issue in fact in the same cause
 as there must be, the dem. is regularly tried first - then
 the jury can assess all the damages on the part of the
 plaintiff of the dem. as well as of the issue of fact - still in
 discretionaries with the Ct to try the issue of L. first or last
 4. Ba. 130. 1. Inst. 72^a 125^b 5. Com. 136.

If an issue is deemed to & another traversed, & the dem.
 is overruled, the plff may enter a nolle prosequere as
 to the issue of fact, & have damages assessed on the other
 part only. Salk. 219. 574. 1. Inst. 72^a 4. Ba. 130.

Is a R that there can't be a dem. to a dem. - this avoids
 a discontinuance.

A dem. don't alledge new matter of fact; it refers to what
 is alledged. 4. Ba. 131. 20. Bay. 20. Bomb. 306. Salk. 219.
Lamer. 171.

It follows then that in all cases where one party dem.
 urs, the other must join. Bomb. 306.

The bar the Dem. to the death is this - "the Stat says that the death & the matter therein contained are insufficient in L. & hence of course judgment - The answer is "and the Stat says that in death & the matter therein contained are sufficient in L. & hence of course judgment. Thus the form is longer. Larus 172 L. & H. 25. 60. Little 41. bomb 296. 3. 4. 36. 29. 29. Larus 253, 4.

But in Case too unnecessary to conclude with a verification, nothing new being added in the Dem. Larus 172. L. & H. 25. 5. 11. 132.

Of the Effects of Dem.

In criminal judgments on dem. unless it is voluntary there is judgment long, i. e. final on in chief - no plea over. 4. Buc 172. Just 106. Dyer 62. 141.

Thus in criminal cases, short of judgment, the case is the same. There is no plea over after dem. overruled in these cases. 4. Bl. 191. 4. 60. 60. 2 Hawk 343. Larus 6. 11. 2. Hal. 26. 139. 2. Bl 334. 8. Corbin Hal. 157. 141.

But in pleas of capital offences, the better opinion is that after dem. overruled the Stat may plead over. 5. Bl. 334. 2. Hal. 239. 257. 319. 2. Hawk 334.

But if the Stat demurs to the death & continues in abt., still the Stat may join in bar & have judgment in chief - thus continuing in abt. does not make dem. a plea in abt. Thus if the demur & continue for a year that the writ may be granted. Larus 172. 3. Larus 319.

There are 2 kinds of dem. viz. 4. Stat. 1. Just 172.

A *g. dem.* assigns assigns no particular cause - a *sp. dem.* is one that points out *sp. dem.*, the particular defect on which the *dem.* is founded. So that if the *sp. dem.* says that the defence is insufficient in *l.*, & wants form, tis a *g. dem.* But if for cause he says, he *sp. dem.* assigns that the other party has not laid the place, in which the injury was committed, tis a *sp. dem.* 4. Be. 132. 1. Just. 172. Lam. 167. 4. Be. 142.

Tis so by hams that *sp. dem.* were introduced by the stat of Elizabeth. 27. This is incorrect for they were known to form that time - that stat only makes *sp. dem.* necessary in certain cases in which they were not so at *l.* So it makes them necessary in all cases of defects in point of form. Hab. 222. 1. Stund 397. 4. Be. 142.

But tis not sufficient to constitute a *dem.* that the cause be assigned - for if the cause be *g. dem.* assigned tis still a *g. dem.* Thus if A says, I for cause he *sp. dem.* assigns, that it is uncertain & wants form, tis still *g. dem.* brought in order to make it *sp. dem.* to mention that tis uncertain the cause no venue is laid or no certain time laid, or no certain quantity laid D. Ray 781. 1. Wh. 217. 1. How. 251. Barcl. 297.

All *dem.* were antiently *sp. dem.* - this was observed by Coke who lived in the time of Elizabeth when the stat above was made was made - he says tis a good *Pr.* to make all *dem.* *sp. dem.* in all cases - he means that tis a safe manner of pleading the libel for it gives the other party notice of the nature for cause of *dem.* Tis safe also for tis sometimes difficult to determine whether the defect is matter of form or substance 2. Barb. 262. 1. Just. 240.

Tis a *g. dem.* that all substantial defects that is material ones are reached by *g. dem.* But defects in form, only by *sp. dem.* under the stat 27. Elizabeth

If there are damages sply arising from sply cause, he may take advantage of a defect in substance. tho this is not sply pointed out. 10. 60 88. Holt 291. 2. Bl. 216. 418. 1. Inst 72. Holt 127. 164. 292. Str. 625.

This R of 27 Eliz. is observed I believe in all the states. tho it is here. here adopted the reason of the stud. at L. L.

In the 4. & 5 of chime the necessity of sply is raised farther than in Eliz. - this enacted by that defect in power must be attacked by the sply defect. That extends the R to contain particulars can supposed not to be within the alt in stat - so too it extends the necessity of sply. 4. Bac. 132. 5. 6.

The stat rendering it necessary as to matter of present intent to assault, indictments, or actions on penal statutes. 6. 8. Reg. 27.

In all sply two things are necessary. 1st that the matter alleged be sufficient. 2nd that it be alleged in the form of L. The omission of either of these ingredients is good cause of dem. - the power of L. dem. the latter of sply. Holt 292. 163. 4. Bac. 2. 132. 1. Mod 171. 1. Inst 303. 2. 8. Reg 798. 802.

But what is substantial & what formal defect is an important question - But they admit only of L. definitions. being in their nature abstract. The next definite one that was here given is the following - The omission of that without which the right of action does not appear is a defect in substance - But the omission of that without which the right of action does sufficiently appear, tho that right is not alleged in due form of L. is a defect in form only. The objection is that the right is not alleged, or deduced according to the power of L. Holt 292. 3.

Thus if the *plff* wants to sue the first owner of a cow
defective in point this is matter of substance for the right
was only to sue upon the propriety of the de-
fect - so the *def* the owner might have appeared.

So if the mistake is omitted as a defect in substance -

So in order to submit a *h. l.* the owner must show, that
his dog has been accustomed to kill sheep - but the *ban*
stat has indeed waived the *h. l.* & enacted that the
owner shall be liable for all the mischief his dog
has done.

But on the other hand the place where an action
of *apt & battery* is omitted is matter of form only for
his immaterial where the battery was committed, the
action being transitory - the same appears. But the
analogous form of *h.* required that the venue be laid.
5. Bac. 2. 114, 115.

Again if the defect be double in a defect in point so
if *cont & tort* be joined in the same *debt*. Thus if a defect
in point for the *cont* was enough. The right of *con-*
sensus appears in this case but the *debt* is laid in point
of *form* - So if the *def* pleads *aptly* what amounts to
the *h. l.* as a defect in point. This defence appears, but
the form of allegation is deficient.

From what has been said it results, that when there
is a total want of substance, as when one sues another for
not treating him civilly, or when a material allega-
tion is omitted, a *h. l.* is proper so in favour of the
plff, *dog* not *steal* *fray*, or in *tres pass* not *shale*
that he was in *posse* at the time a *h. l.* is *wrong*
done, this is enacted by *h. l.* for this is essen-
tial to the right of *recourse*. Holt. 133, 138, 232, 301.

q. 36. 394. fo. lutt. 72^a. Canth. 382. 1. Fidenjini. 85. 2^a
624.

Thus far of the defects in form & the defects in substance.

If one party pleads a plea by which he appears on the fact of the plea to be satisfied from plea, he is not bound for he has no right to plead it in any form. Canth. 380. 98.
40144. 158. Will. 19.

A plea does neither in other formal defects than such as are specially assigned as causes of defence for as to defects not specially assigned to by plea. So if the death is doubtful & wants venue, & he assigns want of venue but not the duplicity, he can't take advantage of the duplicity for he has not assigned it. 10. Co. 85.

When the judge is for the death and does no manner of concurrent action for the same cause of action and afterwards he sustains on the same grounds as are disclosed by the first death. But when the plea puts for want of an essential allegation, he may declare in another action for the same cause, violating that allegation. The second action here stands on more grounds than those first declared on. As there is no doubt that no one has a right to have his cause tried more than once but here in the first case the real merits were not decided. The grounds disclosed are different. 1. Will. 240. 304. Exp. 165. 2. C. B. 779. 828. 2. 2667. 8. 2. 161. 6. Mod. 20.

So also if the plea misconceives his action he must bring another action for the same cause for the actions are not similar & concurrent. As when the plea misconceives, where he ought to bring was. 6. Co. 1.

7 W. 240. 304.

The same R. by notes of the plff facts in the plea in bar
as if an l. case. 2 Bl. 772. 831. 832.

In Eng. Judgt for the plff in one real action, is no bar
to another brought to try the same right for they are
not similar or concurrent. 6 Co. 7.

In Lon. we have but one real action disseisin

Whenever the right of a man has been tried, the cause
can't be tried again. So if in London demand & in parcel
have been stated but not assession & the Jt. in-
stead of demanding pleads a release, & assen is taken &
decided for the Jt. the plff shall sue again.
6 Mod 207.

A dem. should extend to the whole of the Jt. as the
other side with a fact is assumed in some ^{other} way then
the dem. should be in confusion with the facts not then
assumed runs to 11 Can. D. Pl. Cases 171. 2. With.
481.

A dem. reaches back thro the whole record & attaches
on the first substantial defect in the Jt. & not the
first formal defect as the sometimes sd. Holt. 56. Salk. 511.
1. Saund 285. 199. 200. 1 Co. 110. Ed. Ray 1284. 3. Co. 52.
8 Co. 120. 193.

I say the dem. attaches to the first substantial defect
for defects in form are waived by Jt. as 4 Co. 111. 3. Salk.
244. & Rep. 13. 3. Salk. 558. 640.

But there are some exceptions to this Rule 3 Co. 92. 8. Co.
120. & 193. 221. 2. 31. 35.

If there are two pleas in law, one of which is deemed to be
 other being insufficient in L. judge must be for the first.
 Pres. 751. 1. Summ 80 note.

Dem to Evidence.

This is a rule the rational basis. In some cases when the
 issue turns on a fact, one party may be
 the examination of the case from the jury, to the L. by
 deeming to the end. The dem must be taken, before the
 party deeming exhibits his end for to impose on to
 request the it to weigh the end of each (then see whether
 one is sufficient to counterbalance the other, so in law,
 Reg. 404. 6. 1. Pres 72. A. N. P. 13. 1. Root 190. Collyer 16.

The relevancy of ev is matter of L. always to be determined
 by the Ct. This being established by the Ct. ^{the} question how far
 it tends to establish the point in issue is matter for the
 jury to determine.

By the relevancy of ev is meant its pertinency to es-
 tablish the issue - if it conduces in any degree to do this
 its relevant.

In a manner that matter of L. is to be determined by the Ct
 & matter of fact by the jury - Reg 380. 2. H. 36. 2. 08.

It never can be proper to demur to ev that is applicable
 to the whole issue however weak it may be. 2. H. 36. 2. 08. Reg 420.

The dem. facts are ev to the matter of fact & the jury is no
 more concerned with the case - dem. refers to the Ct. the ap-
 plication of the L. to the facts shown in ev. 4. (Ba. 196. (Ba. 119.
 5. L. 8. 104. Bro. 6. 751. 2.

The dem. then admits the facts shown by the adverse party, in
 and - & like all other dems. ruins the legal operation in favour
 of him who exhibits them, or their sufficiency to support his
 issue. 2 Jones 161. 1 Inst 72. 2. H. 36 1205. 6.

The facts then must be first ascertained - till this is done, no
 question in dem. can arise.

Matter of 2. is a conclusion from matter of fact. the ques-
 tion here is their sufficiency - hence the facts must first
 be ascertained. 2. H. 36 1205. 6.

It is to be taken to allegations in support of the
 cause when dem. to ind. is only taken to ind. advanced in
 support of one side of the issue other issue joins. The former
 can never be taken after issue joined - the never before
 issue joined.

It is heavily agreed that when the whole ind. exhibited is
 admitted it may always be demurred to, & the party exhibit-
 ing it, must either join in the dem. or waive the ind. It
 being all admitted there can be no danger of variance - the
 pleading makes it certain - to whom a dem. is exhibited in
 support of a plea or where a count is exhibited in sup-
 port of a plea. thus may be demurred to. 4. Bo. 111 72. 1. Inst. 181. 2. 3. Bo. 372. 1. Inst. 570. 1. Inst. 7. 1. Inst. 106.

But whether a person exhibiting a plea is bound to
 join dem. to ind. is not settled by the old authorities. 2. Bo. 121. 2. 1. Bo. 104. 1. Inst. 87.

In 2. Bo. 121. he holds that a party is not bound to join -
 & the reason assigned is the uncertainty of such ind.
 but as to this the following seems to be obvious - & it is
 clearly settled, that in such case, the parties may agree that
 the ind. shall be deemed to - hence there can be no objection.

then - from his impositions that there should be any are
to object. See 6. 512.

2nd It is fully settled that if the testimony of witness
is adduced as evidence from any positive fact, the witness
by many times in admitting the fact on the record, obliges the
other party to join in same - as to waive the evidence. So in the
case if the party offers a witness to prove the common law
negligent keeping - then if the other party will admit that he
was present to the evidence. So in case it is the case that
in issue would be negatory to answer. 2. H. B. 206.

3rd It now now settles, the formerly law was not that if person
and which is exhibit is certain or direct, & explicit, in party
by confession it to be true on the record may only be
is party to join in same or receive it. 2. H. B. 206. 27. 1.
Dun. 114. 143.

Confessing the evidence to be true is the same as confessing the facts
for one uncertainty follows the other. 2. H. B. 206.

But confessing the evidence to be true can't always obliges the
other party to join for. 4th If the evidence be true & material
note the evidence party and receive without admitting the
facts, which it tends to prove, but by such admission he
may answer to it whether written or heard - By loss of
indeterminate evidence is received that which is continued evidence
it proves evidence. i. e. Doubtful. 2. H. B. 207. See 6. 419.

5th If the evidence is immaterial, the party answering to it
must admit or deny distinctly every thing which it
tends to prove. every thing which the jury are to be
this is distinct from the last kind of evidence.

The witness may testify positively to facts, which facts
are circumstantial evidence, & may be used to prove a fact.

of facts, therefore if not admitted, tends to avail nothing
circumstances are in most frequent occurrence in
cases are most frequently a result

the result which is in fact as per to prove facts which
are to be proved. Since facts in the latter part, cannot be ad-
mitted. St. 42. 33, Doug. 115. 122, (Bul. 315, 317, 122. 33,
1. H. 35. 107.

the then, for, is not competent to answer, Hofmann
is not the duty of the other party to join in a dem-
-for whom he is not competent, join in a party to answer.
is not the other party to join.

But in the last case is the party answering, and under
the admission of the other still he joins. It is not a rule
just as the one refuses to the other the burden of proof
as well as the admission of the one. St. 42. 33, 4 Ba. 133,
2. H. 35. 209.

the aim to use the point in issue is whether the one
one is sufficient, or to maintain the point of
fact in issue - is to be shown that the whole end
is in support of the point in issue is to be shown to
not any particular point alone. For the question is not as
to the admission remedy, but whether the whole end is
to be shown a point which is sufficient while the whole
might be more sufficient. St. 20813

This aim is not to the plea - therefore in such cases, no
advantage can be taken of any part of the plea, Hofmann
in case is determined advantage of a point in the plea, Hofmann
time in answer of next after a plea. St. 313.

is to say to show that a question here is on the same

Reading

Reading 407.
policy is a measure in answer - I thought it
like might be repeated if just after our
unmistaken as it supports fact by implication -
the jury could not have found the facts stated
had been proven.

But on dem to me all the parts are started on the way
nothing was in presence. Only. 22%.

I think it starts on the same moment as a motion after
the report, or motion in respect, ~~and~~ after which some
facts but those that appear on the same moment are
implied. Aug. 213. Rev. 213.

The party whom we intend to meet always occur at
the point as they do, whether he is bound to pass or not.
The it will not surprise him to find them there is no culpable cause for that except
delay justice are frivolous pretences. If he were to see
he should have to be made in bank again & this time
to us next back to c.k. I agree. Bull. 264. v. 30. l. 44
Ab. 208. Allen. 218. 2. Roll R. 117.

We can & justify the most perfect as to do away the
 thing indefinitely - & then a visit of inquiry is to be
 given after just.

Sometimes however the jury act, however occasionally so if ever, in favor for the ptty. I never saw any by agreement otherwise than the agreement is of no effect. 20th. 1845. Dec. 1. 1843. Ed. Aug. 20. Dec. 11. Nov. 4th. Dec. 9th.

According to the true practice there is no ap-
parent day the spring - nor is there any wind. I sup-
pose - the judges themselves agree that our eyes are there.

9. 134. 386. 398.

But this is not rigorously the case it occurs in
after default, or after time to pay is overruled or when the
Deed is filed &c. St. 1871. Chapter 18.

According to English records are counted, for instance, 600,000,000 - i.e. those which appear on the face of the record.

Disadvantage is to be taken of extrinsic causes by new law
at one hitting a ball of excellence on the lake - So if the
other varies totally from the unit the unit will be
isolated - & if not his error - So if the unit is wrong
in debt & the unit is sure, here his answer is the
second that there is a variance for the unit wants
no such differ. 4. Pl. 379.

It also when the verdict runs manifestly from the
issue, and will be run to - since the issue is at once
within view, that such verdict is necessary, even if the issue
is found for the verdict. The facts in question are not ascer-
tained - & a judge of it must be a conclusive power fact.
So that if the issue is whether or not the fact of the fact
is that the fact was a bankruptcy, & the verdict runs that
the fact is the fact was a bankruptcy, this is a manifest
a variance, & the Ct. can't under such verdict except on those
facts, that although it found or necessarily in the
from those that can found. 3. R. 371.

So if the letter is wholly deficient in substance, & misdirected in point, the letter still must necessarily be corrected for the misdirected only previous parts, situated in the letter, & must. And if most unimportant are those parts so found. & have the parts are unimportant without a post. B. 11. 119.

In the other hand, if the Stat. has directed us as to the
 point & direct us as to the law, much more is directed
 as the 1st - & if to direct the place not generally & the
 Stat. is here for the Stat., it has outgrown nothing want-
 ing to the case - his time not amply spent that he
 was not on the Stat. & 21. 174.

As if he shows that he was never called & of course joined in
 this point still this is no defence.

Then it can be seen that the difficulty consists in applying
 them to particular cases for what time of day is there
 in Stat. now just in question?

1st The Stat. is that judgment may be awarded for any
 cause after verdict, which might be assigned for notice
 after verdict & must. So the only question is what Stat.
 after verdict & Stat. can be assigned for cause. 8 Ham. 174.
 2. Crook 516. 2d Ch. 79.

This being the question the Stat. is, that if the Stat. is
 only of the 1st title or cause of action is specified, but not
 in verdict. Hence if no title or cause of action is stated in
 the Stat. 11. 122. 2d Ch. 320. 1. 2. 174. 2. 179. 2. 179. 2. 179.
 2d Ch. 365. 4. 2d Ch. 365. 2. 174. 2. 179.

As if then the 1st Stat. was a Stat. only in which time
 appointed, this is said by verdict; for it appears that the
 1st Stat. has been given & the 1st Stat. has a right to move
 whether the Stat. is in the Stat. or not. 1. 174. 2. 179.
 2. 179. 2. 179.

In the Stat. there appears to be no Stat. for Stat. & moving
 cause, the 1st Stat. is not Stat. for Stat. &
 verdict for the Stat. this is not said by verdict for
 the Stat. is in the 1st Stat. the Stat. is not Stat.

they were two yards - so it can't appear that any part of this has been violated since in the case before a court.

So in London for calling the p'ty a join & undict for the ~~def~~ p'ty - this was done the 1st t. There is no case of action the words are not actions in. Lang 658. 1st. 1846. 1853. 1st. 465. 3. 4. 1. 42. 5. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

So if an action is brought in the instance of a defect in, the p'ty not attending that notice was given to the p'ty it was to be left & not to his statement the notice was never in form and must be given.

Some thing, mutatis mutandis, applies to the def's defence which he pleads, as applies to the notice - if the defence of defence and is defective, the court will give it - even if the defence itself is defective - So if we do not get by in pleading his own defence as defence & have undict can't cure it.

(But if accused & not. is pleaded without mentioning the day on which he was made & undict for the ~~def~~ p'ty, this will be aided for undict - for the defence. If regard the defect as only to the statement, bro 6 172. bro 6 599. 4. C. R. 452. 1. 2. 545. 2. 3. 325. 3. 152. 4. 1. 172. 518. 4. Do. 472

3rd Another is that any defence that will support an issue & not support an issue will have been taken out of him. this is an universal rule, but not a exception. So if it appears that it would not have supported a case, it will not support a motion in arrest of judgment - But this Court would not support the next time that a motion will support a judgment will support an arrest of judgment - for many things that would have

4/12 Praching
 from all our b. trees. are covered as ancient a day to the
 on t. b. 18. 50. 4.

[illegible]

to it has, is declared upon & no doubt on which the
 true was committed, & the day ought to be a reason for it
 must appear to have been committed when the unit
 is paid yet after undisturbance to have been com-
 mitted before the issuing of the unit, since the jury was
 in the direction of the it could not have found for
 the 11th unless this had appeared & Bec. 24. 54. & do.
 196. 189. 160.

The other words the principal of the 2. respecting a defect being added the verdict is then After I verdict the it with permission that these facts, not a lodged but one travels without from there that are a lodged & found were proved to the jury as in their choice.

The jury my finding supplied the sum of damages
As if nothing is added without sum of money
this is good after verdict - for the it will surely
live, since happened to in human response it -
Did I not then this would be good as done the same

Reading

413

medium autem sum to in lib, what amount to a
replevit it. 5. 32. 117.

In short the it will always prove a sufficient
any case which is found a' fact will amount
the finding 4. 110. 232. 130. 133. Lane. 148.
one 141. 8. 10. 32. 141. 162. 5. 110. 232. 141. 142. 143.
144. 4. 30. 140. 5. 30. 32. 7. 141. 142.

The same it is different words, the it will prove
same after without anything that it was more
far the party who took the affirmative of the issue
to prove to support it. 4. 110. 232. 130. 133. Lane. 148.
472. 141. 142. 143. 144. 145. 146. 147. 148.

On the other hand the it can't prove any fact
which is shown which the verdict will be in
point as had to prove to prove to support the
action. 141. 142. 143. 144. 145. 146. 147. 148.

Thus of the it in this state no value as it in
damages, & the jury find a value, the it will
complain for he might have been damaged. The ver-
dict answers what was uncertain, as he must
have proved a value in order to prove it, even
the it will prove of course that he did prove
some value.

So when in law the it will to law, the jury
cannot, after verdict will be pronounced for the it
must be pronounced to mean that which was
in the law. The date of the verdict 141. 142. 143. 144. 145.
146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160.

And if the it should be made by mistake, by a jury
in this state, this is an impossible day & is

4/5 *Reaching*
the more or buying no day at all, & so is within
the last of R. Bull 181.

So if the grant of an *discharge* is, that without buy-
ing it to have been done by deed, he would be awarded
- for this must be by patent & the principle here is
that the *discharge* is not admitted nor legal
out, i.e. the end of a deed to go to a jury of course that
been done by deed is presumed. Hutton 84

certain nothing can be presumed to have been presumed
except the facts which are alleged & proved and such
as are necessarily implied from them.

To exemplify the neg. part of the R. just mention-
ed, suppose a death to be actually word of subsequence-
- time is taken on it & found for the life - the death
is not needed. for no fact can be presumed, which can
make it good. So if an action of slander is brought
for calling a man a Jew *1. Hutton 1728. 2. R. Bull 17. 28.*

So also if any fact is admitted which is not inferred
from the facts stated & found, this point must be pre-
sumed to have been proved & would doubt and the fault
be in the *fact* *1. Hutton 1728. 2. R. Bull 17. 28.*

The more action of covenant but in an agreement of his
performance of another present is not near. This is not
taken by deed, for he has not done what gives the
right of action. Hence is observable that the fact admitted
is sufficient to warrant the jury in finding the fact
to be so. So in an action on the case for mischief done he can
not, the jury find some more in the fact, which is in dis-
- putable to the cause of action - this is not supported from
the note states. *1. Hutton 1728. 2. R. Bull 17. 28. 3. R. Bull 17. 28. 4. R. Bull 17. 28. 5. R. Bull 17. 28. 6. R. Bull 17. 28. 7. R. Bull 17. 28. 8. R. Bull 17. 28. 9. R. Bull 17. 28. 10. R. Bull 17. 28.*

for the rule gave plea is on his part & the debt
committed the great fault. Holt. 56. 4 do 110 R. 2 & 44.
D. (May 1860)

And when judgment for summons of a verdict is awarded
a judgment for the party for whom the verdict was
found, every conclusion he wanted is noted that in the
the verdict. It supra pro. etc.

Thus if the debt is actually sufficient - the plea in
bar is sufficient or not. the plea is awarded to the verdict
given for the debt. it must be awarded. & as for the debt
returned. Holt. 56. 114. 200. 8. 42. 12. 23. 4. Rev. 301. 0.

Suppose the debt is good, the plea in bar is awarded,
multiplication given or not is made & returned, the verdict
or for the debt. still verdict will be awarded & returned for
the debt. for there is clearly no defence. 1. Rev. 401.

Of Repleader.

A repleader is not a necessary the case as is sometimes
said - but the party in whose favour or against whom a
verdict is awarded, is not a necessary party to the trial. For if the
verdict is awarded on an immaterial issue, so that the
court is aware from the record for whom verdict is awarded to go.
a repleader is awarded in favour of the party for
whom the motion might was awarded. the court is aware that
the parties repleader - quod partes repleader. So it is
is awarded. as a court to pay judgment or to go.
a day certain. & there is a place of judgment between the
party. here if issue is made on their plea & found for the party
as immaterial, for the finding does prove that the party
did not take plea on the day - But if it had been found

the plea good of the 1st being an immaterial point
of it, as a plea might be awarded. But to make a plea
immaterial, or not immaterial, is an immaterial point. Leah. 173. 216. 517
1. 81. 495. 500. 501. 502. 1. 11. 116. 117. 118. 119. 120.

But a question is now arising on account of the immateriality of the issue, in favour of the party who loses it. But know my decision to this point. But I have decided on all this if he knows of any case in which he has lost it was awarded by him in the negative. Leah. 173. 508. 1. 11. 116. 117.

If then the plea in bar is an immaterial point is immaterial, & just is for it, the 1st has no more. He should have taken issue on a material point.

the issue may be material if found one way; but immaterial if found another. So if an action is brought in a court of law or before a justice, plea of just before the issue joined & found for the 1st. This is immaterial if found for the 1st his material. But if it is found immaterial, it is but a matter of form, not a matter of substance. If an issue is an immaterial point - an immaterial point has many other doubts. If a plea is immaterial, the finding may make it material. I say to myself that the 1st is a matter of form, but the 2nd may make it an immaterial point. The reason is the finding makes it certain. Leah. 173. 508. 1. 11. 116. 117.

If the jury, after finding a fact specially, make a conclusion of their own from it, the 1st is not bound by it, but will give their own verdict on the facts. But the 2nd is bound by it as to finding in fact, & the jury after finding the fact can bind them. If then I find a fact in fact this is a plea. 11. 60. 10. 11. 116. 117. 118. 119. 120.

So if there are two counts in one debt & one is good & another bad, & the jury find a 4. verdict & ass. p. then the entire debt will be awarded for it will appear that they were ass. p. wholly on the good count.
 10th. 12 Co. 130. 11th. 18. 2 11th. 177. 2 11th. 318. 12 2 177. 24
 11th. 161. 1. 1. 1508. 92.

And yet such a debt would be void under the plea in debt & debt would be awarded. But this does not contradict the l. that whatever act is ground of an arrest of judgment must be such as would be good on dem. For that l. relates to plea - this to the verdict - There is clearly a cause of action in the debt for one count is good so truth not a bar on dem. But the damages should have been ass. p. separately. 3 Do May 19. 2 Nov 1771.

But if separate damages are given on the several counts the full value taken thereon the l. does not take effect for there on the good count there is a value remaining?

So if in one count the debt is charged with calling the pty a thief, & in the second with calling him a liar, & separate damages are ass. p. the pty may recover the damages on the bad count. All in point.

And the entire damage ass. p. find. if no verdict on the bad count, the verdict may be awarded by the t. from the judges notes so as to award ass. p. on the good count only no other verdict. The judges notes is allowed for this purpose. Doug 461
 11th. 114. 1 11th. 174.

This plea to the two counts is not in use in some

- for here we give the change in our court.

The law of the other court of last year and last session
two distinct cases of action, one sufficient & the other
not so, & there is a by himself & when I was in the
court could be avoided. So here the other is treated
as though it was in the court of action was not
in two distinct cases 1. R. 493.

It is of sufficient points of an action case of action
one law in the same court & I was in the
it, just as it is avoided the one point is less in
another given 1. R. 494.

When such is avoided in those cases, whether for
want of, misdirection or otherwise, a new case is
is avoided, not a substitute - for the law is
negotiable, & a replacement is entered only to
avoid the point. R. 495 & 1. R. 496.

But the rule of law in cases of law does not apply to
criminal proceedings - for of these cases, one court
in the other case, one is given & the other is not
judicial is brought in the court and not be avoided
it for the jury not affected by the proceedings. In
judges are given just as the jury and only - it
is no concern therefore for the jury to be avoided
R. 495. R. 496. 1. R. 497. 1. R. 498. 1. R. 499. 1. R. 500.

I have said that in the court, for criminal proceedings
are intrinsic - as the court is a court of law,
a jury - the extrinsic cases in law are to be avoided
for want of jury - as if the jury and the court are
third parties as court & the jury, R. 494. R. 495.
1. R. 496.

The master of the house towards a party is
 also a name for answering right. So too if the same party
 party transfer with a party to the case of nothing more a
 verdict on the 1. Inst. 125. 12. 2. 222. 2. 656.

So if a person is intimate & so greatly related to the
 party as to be a person for a principal challenge
 right may be admitted. And it is so much related
 is the bond of the party as to a person of such that
 judge, the case of consent. Hilly. 18. 184. 244. 2.

Whether cause in com. is a person's having before
 has an inhibition in the same cause, or has given an
 opinion, or has been an atty. Hilly 164.

The 2d. here is if the inconsistency goes to the material
 ity of the person & would be good cause for a principal
 challenge for good cause for cause has the right
 Hilly 19. 184. 184.

But the 3d. goes to the materiality, if the party
 does it in error to make the challenge, it shall not
 be received in court as judge. for he then wears the
 cap & Inst. 212. Hilly 164.

So if one of the parties has been in the cause in one of
 the other, his grounds for principal challenge has
 not abatement for as the names of persons are on record
 they are supposed to be known to the party, & he
 should have waived himself of it before. 2d. 184.

The usual way is to state extrinsic causes under the
 law for a new trial. 5. Ba. 15.

The 2d. being, since no costs are usually allowed
 on either side - for the party acting fairly might have

Demanded & then from plaintiff's expense on the 2th 525
wrote substance of the 577. 1. but 116 10 18. 267. 1. 200. 11.
572. being 82.

And if motion in arrest is overruled & the wrong
brought & recovery had, no costs shall be moved
- not even those incurred before - for the Def^t ought
to have taken advantage at an earlier state of the pro
ceedings. 1. but 104. 1. 182 467. 1. but 579.

The 1st motion in arrest of judgment is made within the
four first days of the term next succeeding the last day
on which it is made in rule 3. 1. 335.

The 2nd motion in arrest must be made on the day of
the verdict being given & accepted - it must also be made
in & delivered to the adverse party or his agent with the
clerk within twenty four hours after the verdict is given
Monday. It must also be returned upon the same day
even tho there are not 24 hours remaining.
1. but 572. being 135.

The form of a motion in arrest is thus "That the ver
dict & before just rendered appears in it, & seems to be
the act of the jury may be rendered on it and set
because he says the 1st 116 10 18 is insufficient in & law
applicable. 1. 116 10 18.

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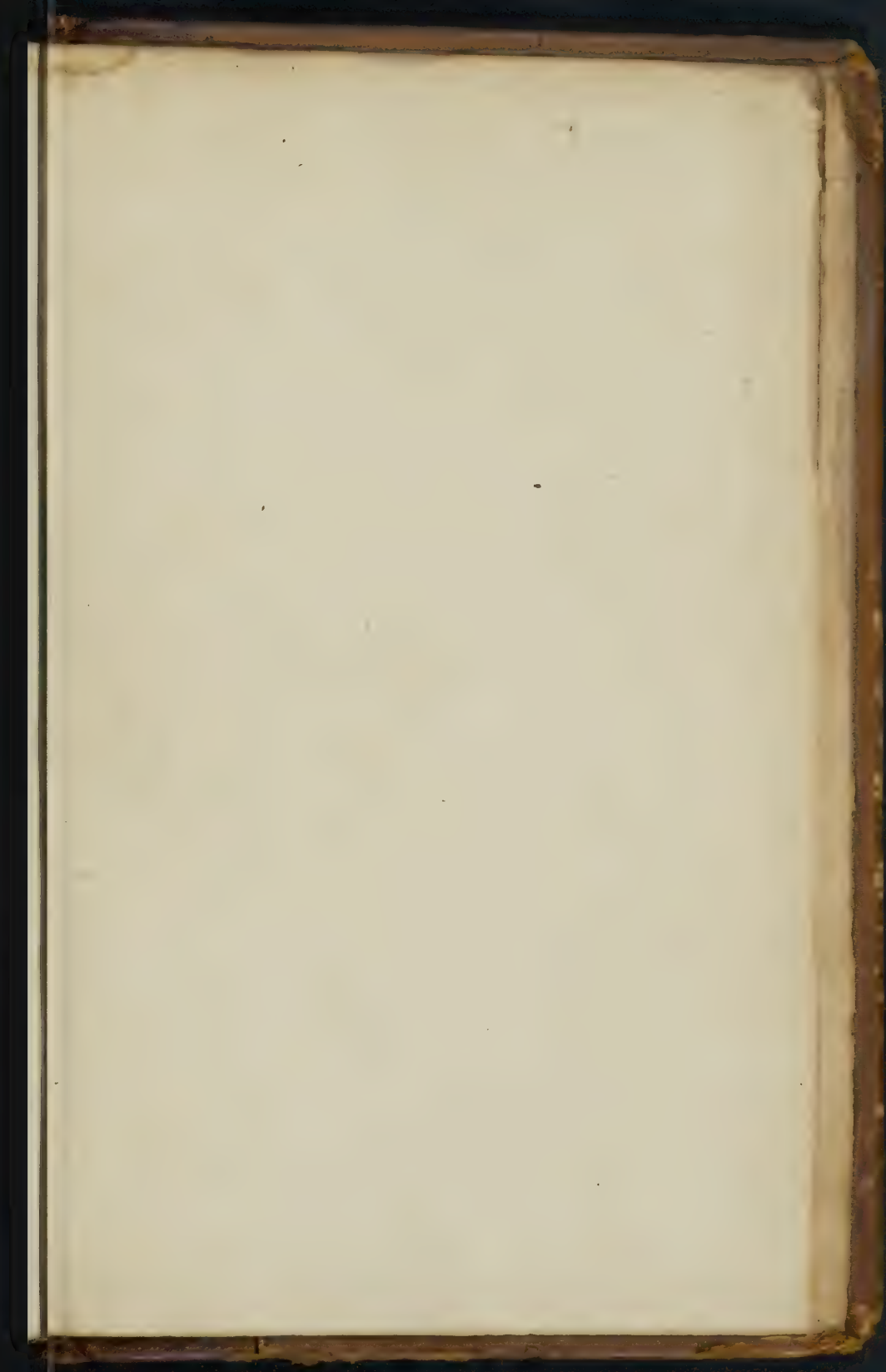
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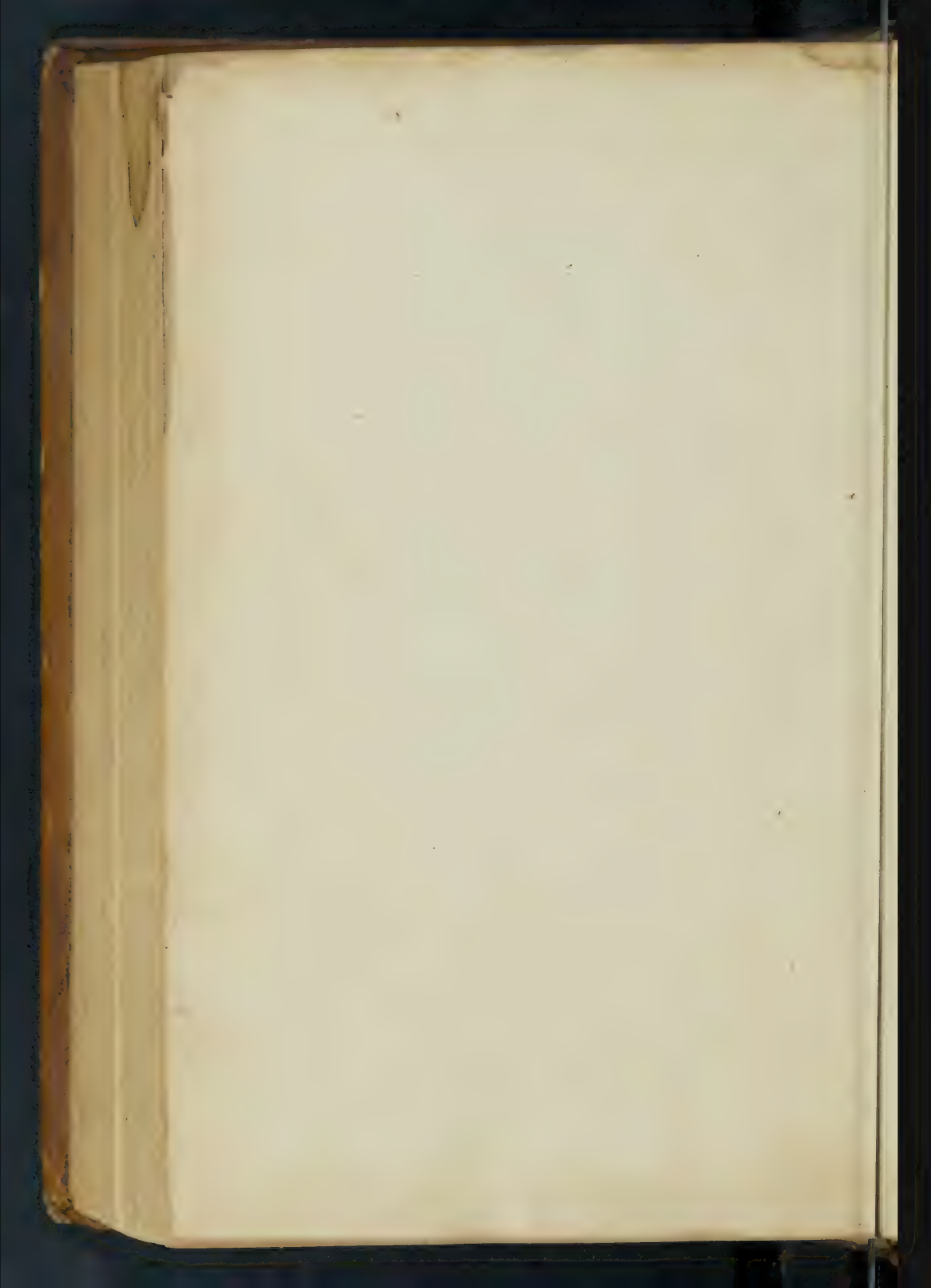
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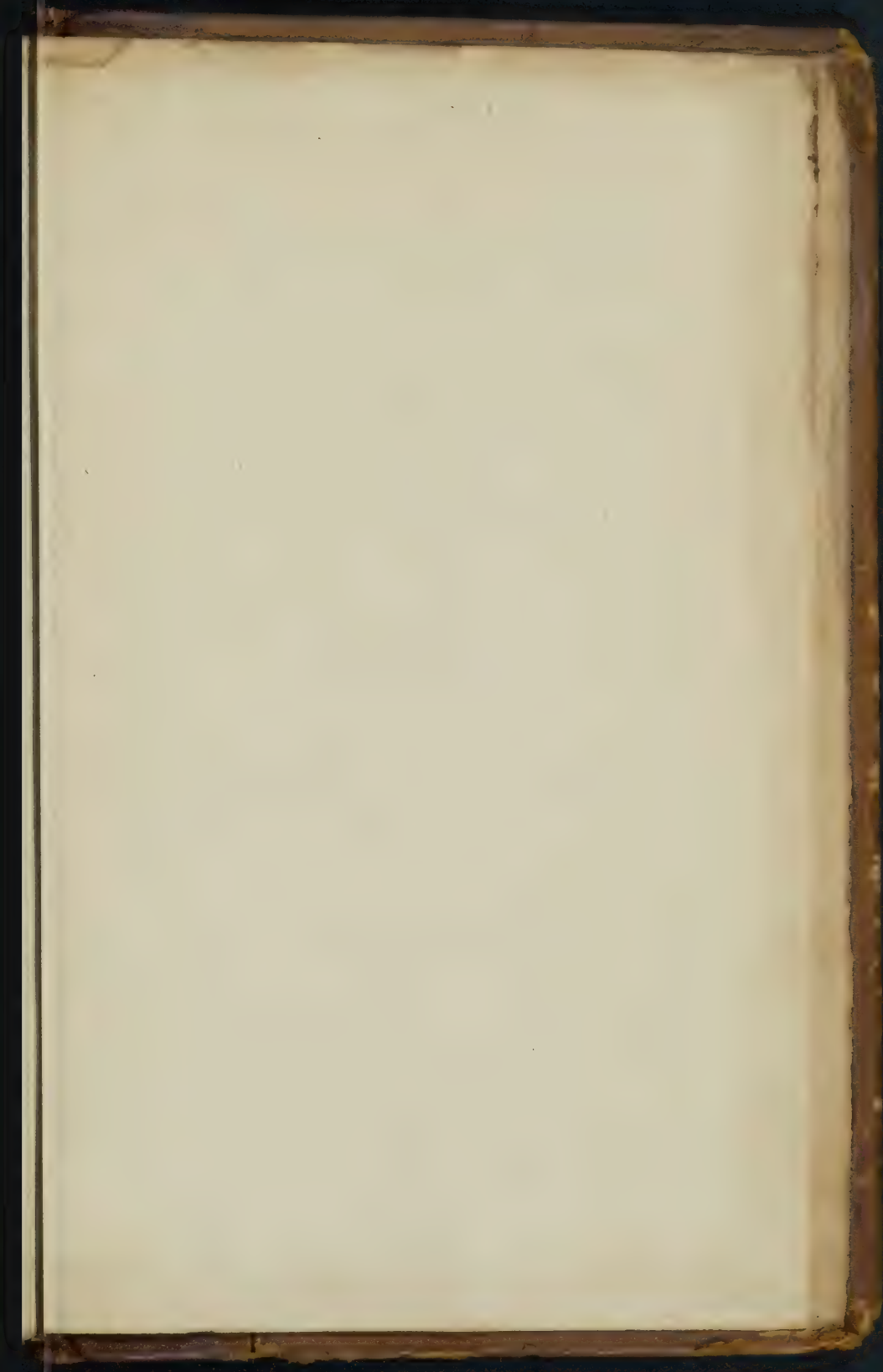
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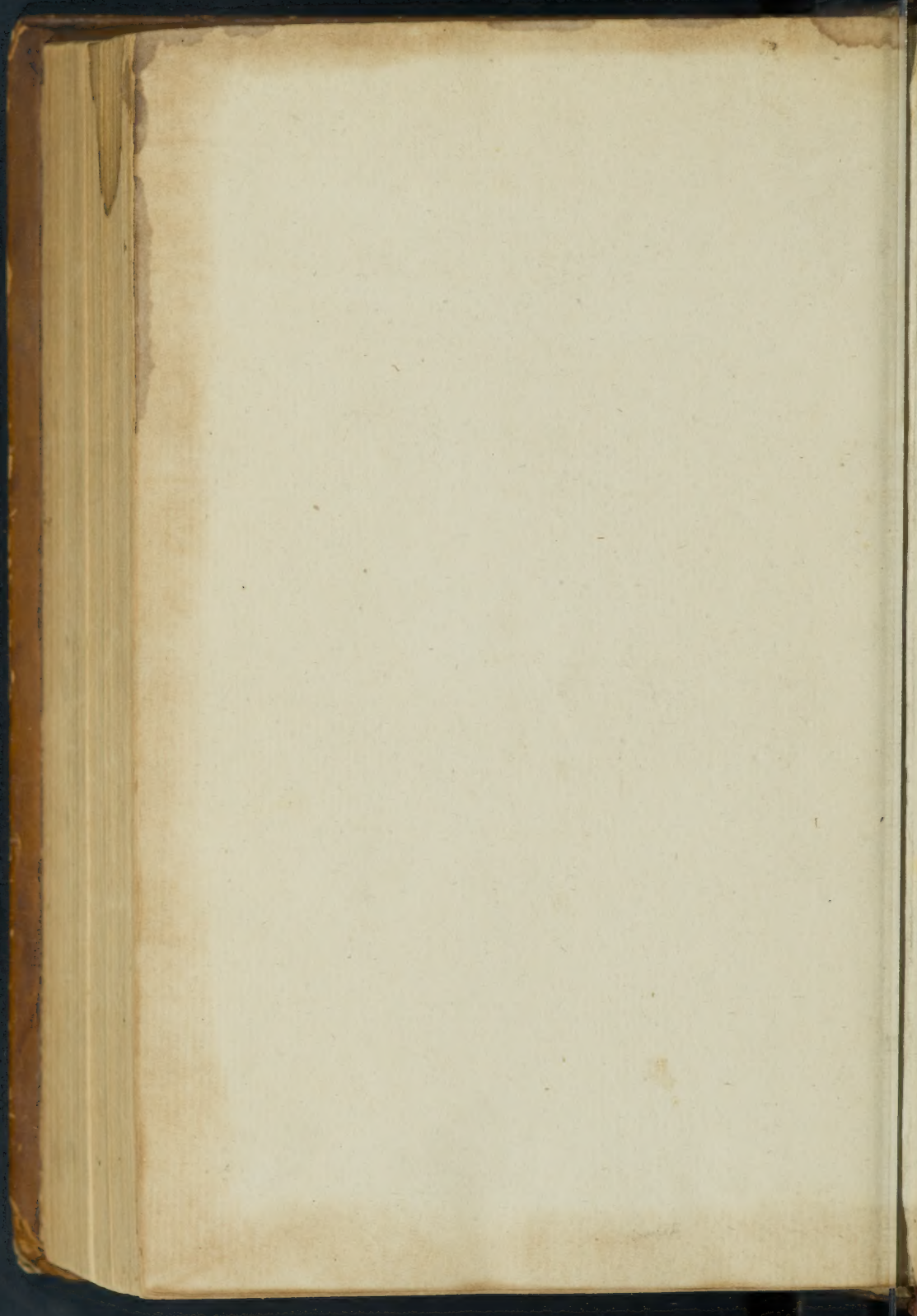
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